TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923

No. 762

THE STATE OF MISSOURI AT THE RELATION OF THE BURNES NATIONAL BANK OF ST. JOSEPH, PLAINTIFF IN ERROR,

vs.

A. B. DUNCAN, JUDGE OF THE PROBATE COURT OF BUCHANAN COUNTY, MISSOURI

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI

FILED JANUARY 22, 1924

(30,072)

(30,072)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923

No. 762

THE STATE OF MISSOURI AT THE RELATION OF THE BURNES NATIONAL BANK OF ST. JOSEPH, PLAINTIFF IN ERROR,

vs.

A. B. DUNCAN, JUDGE OF THE PROBATE COURT OF BUCHANAN COUNTY, MISSOURI

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI

INDEX

	Original	Print
Proceedings in supreme court of Missouri	1	1
Petition for writ of mandamus	1	1
Exhibit A—Order of probate court of Buchanan County appointing executor	7	4
Exhibit B—Notice and service of petition for mandamus	9	5
Order issuing writ of mandamus	10	6
Alternative writ of mandamus	10	6
Answer and return of alternative writ	12	7
Submission of cause	13	7
Judgment	13	7
Opinion, White, J	14	8
Petition for writ of error	34	19
Assignment of errors	36	20
Order allowing writ of error	39	21
Writ of error	40	22
Citation and service (omitted in printing)	42	23
Return to writ	43	23
Certificate of lodgment	44	23
Bond on writ of error (omitted in printing)	45	23
Præcipe for transcript of record	47	24
Clerk's certificate	49	25

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 30, 1924

[fol. 1] IN THE

SUPREME COURT OF THE STATE OF MISSOURI

THE STATE OF MISSOURI at the Relation of the Burnes National Bank of St. Joseph, Missouri, Petitioner,

vs.

Honorable A. B. DUNCAN, Judge of the Probate Court of Buchanan County, Missouri, Respondent

PETITION FOR WRIT OF MANDAMUS—Filed February 12, 1923

To the Honorable Judges of said Court:

The petitioner, The Burnes National Bank of St. Joseph, Missouri, respectfully represents that it is now and at all the times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the banking laws of the United States, and as such is engaged in the general banking business in the City of St. Joseph, Buchanan County, Missouri, and is in competition in its said business [fol. 2] with trust companies, organized and existing by virtue of the laws of the State of Missouri.

That respondent, the Honorable A. B. Duncan, is the duly elected, qualified and acting Probate Judge within and for Buchanan County, Missouri.

Your petitioner further states that on the 22nd day of November, 1922, Mary E. Bird, a citizen of the State of Missouri, and a resident of the City of St. Joseph, made and executed her last will and testament in which she named as executor, The Burnes National Bank of St. Joseph, your petitioner herein.

That said Mary E. Bird, departed this life on the 27th day of November, 1922, and thereafter, on the 4th day of December, 1922, the said will of Mary E. Bird, was duly admitted to probate in the Probate Court of Buchanan County, Missouri, as the last will and testament of the said Mary E. Bird, deceased.

Your petitioner further states that Section 9704, paragraph K, United States Compiled Statutes 1919 Supplement, known as the Federal Reserve Act, grants certain powers to national banks including the right to serve as executors, said grant being in words and figures as follows, towit:

"To grant by special permit to national banks, applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, receiver, registrar of stocks and bonds, guardian of estates, assignee, committee of estates of lunatics or in any other fiduciary capacity in which state banks, trust companies, or other corporations come into competition with national banks and permitted to act under the laws of the state in which the national bank is located. Whenever the laws of such state authorize

or permit the exercise of any or all of the foregoing power by state [fol. 3] banks, trust companies or other corporations which compete with national banks, the granting to and exercising of such powers by national banks, shall not be deemed to be in contravention of state or local law within the meaning of this act."

Your petitioner further states that persuant to the above entitled act, it made application to and received from the Federal Reserve Board, a special permit which is in words and figures as follows, towit:

Federal Reserve Board

Washington, D. C., Dec. 29, 1915.

Pursuant to the authority vested in the Federal Reserve Board by the Act of Congress approved December 23, 1913, known as the Federal Reserve Act, The Burnes National Bank, St. Joseph, Mo., is hereby granted the right to act under the rules and regulations prescribed by the Federal Reserve Board, as trustee, executor, administrator and registrar of stocks and bonds in so far as the exercise of such powers is not in contravention of state or local law.

Federal Reserve Board, by C. H. Hamlin, Governor. Attest: H. Parker Miller, Secretary. (Seal.)

authorizing it to act as executor, under last wills and in other fiduciary capacities as set out in said act and as enjoyed and exercised by trust companies organized under the laws of the State of Missouri, and competing with your petitioner in the banking business.

That under and by virtue of Article Three, Section 11801 of the Revised Statutes of Missouri 1919, trust companies organized under [fol. 4] and by virtue of the laws of the State of Missouri are authorized to act as executors and in fiduciary capacities and are engaged in active competition in the general banking business with national banks and with your petitioner.

Your petitioner further states that subsequent to the admission to probate of the last will and testament of the said Mary E. Bird, deceased, your petitioner made application to the Probate Court of Buchanan County, Missouri, for appointment as executor and the issuance of letters testamentary to it under and by virtue of the terms of the last will and testament of the said Mary E. Bird, deceased.

Your petitioner further states that on the 29th day of January, 1923, the respondent made an order in the Probate Court of Buchanan County, Missouri, declining to appoint your petitioner executor under said will and grant to it letters testamentary, and as grounds for said refusal, stated that your petitioner was not authorized under the laws of the State of Missouri, to act as executor, and in the same order, and at the same time, did appoint Mary A. Williams, public administrator of Buchanan County, Missouri, administrator with will annexed of the estate of the said Mary E. Bird, deceased, and ordered that letters of administration with will annexed be issued to her, the

said Mary A. Williams, and that notice thereof be given in accordance with the law, said order of respondent, being in words and figures as follows, to-wit:

"STATE OF MISSOURI,
County of Buchanan, ss:

"IN THE PROBATE COURT, DECEMBER TERM, 1922

Be it remembered, that on the 29th day of January, 1923, among other things had and done was the following:

[fol. 5] In the Matter of the Appointment of the Executor under the Will of Mary E. Bird, Deceased

The matter of the appointment of the executor under the will of Mary E. Bird, deceased, is now here by the Court taken up for consideration.

The Court finds that in and by said will, The Burnes National Bank of St. Joseph, Missouri, is named as executor of said estate. The Court declines to appoint said Burnes National Bank for the reason that under the laws of the State of Missouri, national banks are not authorized or empowered to act as executors.

Now here it further appearing to the Court that Mary E. Bird, deceased, was possessed of an estate of value, which is liable to loss or damage if a suitable person is not appointed to administer upon the same:

It is therefore ordered that Mary A. Williams, Public Administrator within and for Buchanan County, Missouri, be and she is appointed administrator with the will annexed of the estate of Mary E. Bird, deceased, and it is ordered that letters of administration with will annexed be issued to her on said estate, which is done.

It is further ordered that notice of the granting of such letters of administration with the will annexed on said estate be published as required by law;" and a duly certified copy of which is hereto attached and made a part hereof, marked exhibit "A."

Your petitioner further states that the order of the Probate Court as aforesaid, in refusing to appoint your petitioner executor under said will was in contravention of the rights of petitioner as set out and defined in the Federal Reserve Act as aforesaid, and was an unlawful and unfair discrimination against your petitioner, and in violation of Article Four, Section Two, of the Constitution of the [fol. 6] United States and was in derogation of its rights under and by virtue of the authority in its vested by the Act of Congress aforesaid.

Your petitioner further states that it is now and at all the times herein mentioned, has been ready and willing to comply with all the requirements of the laws of the State of Missouri, and the orders of the Probate Court relative to the handling and accounting of any and all trust funds that may come into its hands as executor, or in any

fiduciary capacity in which it may act under and by virtue of the authority conferred upon it as aforesaid.

Your petitioner further states that no appeal lies from the order of the Probate Court in refusing to appoint your petitioner executor under the terms of said will and in refusing to grant it letters testamentary, and that it has no other adequate remedy at law or in equity for the protection and enforcement of its rights in the premises other than by mandamus.

Your petitioner further states that it has caused to be served upon respondent on the 9th day of February, 1923, a notice of its intention to apply to this Court for a Writ of Mandamus on the 12th day of February, 1923, and setting out in said notice, the relief asked for in this petition, said notice and the manner of service thereof duly acknowledged, being attached hereto and marked exhibit "B."

Wherefore, your petitioner being without other adequate remedy prays the issuance by the Honorable Supreme Court of Missouri, an alternative Writ of Mandamus directing the Honorable A. B. Duncan, Judge of the Probate Court of Buchanan County, Missouri, as aforesaid, to set aside the order heretofore made by him, refusing to appoint your petitioner executor under the last will and testament of the said Mary E. Bird, deceased, and appointing Mary A. Williams, Public Administrator of Buchanan County, Missouri, administrator with will annexed of said estate, and to require him to appoint your petitioner executor of said estate, and to issue to it letters testamentary in accordance with the request in the said last will and testament of Mary E. Bird, deceased or to show cause at some early day, to be named by this Court, why he has not done so, and your petitioner prays for such other and further relief to which, by reason of the premises, it may be entitled.

Landis & Duncan, Attorneys for Petitioner, St. Joseph, Mo.

[fol. 7] Jurat showing the foregoing was duly sworn to by Geo. A. Nelson omitted in printing.

EXHIBIT "A" TO PETITION

STATE OF MISSOURI,
County of Buchanan, ss:

IN THE PROBATE COURT, DECEMBER TERM, 1922

Be it remembered, that on 29th day of January, 1923, among other things had and done was the following:

In the Matter of the Appointment of the Executor under the Will of MARY E. BIRD, Deceased

The matter of the appointment of the Executor under the Will of Mary E. Bird, deceased, is now here by the Court taken up for consideration.

[fol. 8] The Court finds that in and by said Will, the Burnes National Bank of St. Joseph, Missouri, is named as Executor of said estate. The Court declines to appoint said Burnes National Bank for the reason that under the Laws of the State of Missouri, National Banks are not authorized or empowered to act as Executors.

Now here it further appearing to the Court that Mary E. Bird, deceased, was possessed of an estate of value, which is liable to loss or damage if a suitable person is not appointed to administer upon the same:

It is therefore ordered that Mary A. Williams, Public Administrator within and for Buchanan County, Missouri, be and she is appointed Administrator with the Will Annexed of the estate of Mary E. Bord, deceased, and it is ordered that Letters of Administration with the Will Annexed be issued to her on said estate, which is done.

It is further ordered that the notice of the granting of such Letters of Administration with the Will Annexed on said estate be published as required by law.

STATE OF MISSOURI,
County of Buchanan, ss:

I, Fred M. Wagner, Clerk of the Probate Court in and for the County and State aforesaid, do certify that the above and foregoing is a full, true and complete copy of the order made as aforesaid, in the above entitled cause, as the same appears of record in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said Court at my office in the said County, this 8th day of February, A. D. 1923.

Fred M. Wanger, Clerk of Probate. (Seal.)

[fol. 9] EXHIBIT "B" TO PETITION

To Honorable A. B. Duncan, Judge of the Probate Court within and for Buchanan County, Missouri:

You are hereby notified that on Monday, the 12th day of February, 1923 or at 9:30 in the morning, or as soon thereafter as we can be heard, we will apply to the Supreme Court of the State of Missouri at Jefferson City, for a writ of Mandamus to issue against you, requiring you to set aside the order heretofore made by you on the 29th day of January, 1923, refusing to appoint the Burnes National Bank of St. Joseph, Missouri, executor under the last will and testament of Mary E. Bird, and to set aside, the order made by you on said date, appoint Mary A. Williams, public administrator of Buchanan County, Missouri administrator with will annexed of said estate, and further requiring you to appoint the Burnes National Bank of St. Joseph, Missouri, executor of the said estate of Mary E. Bird, deceased, and to grant to it letters testamentary.

Burnes National Bank of St. Joseph, Mo., by Landis & Duncan, Its Attorneys.

STATE OF MISSOURI,
County of Buchanan, ss:

I, R. M. Duncan being first duly sworn upon my oath state that I served the within notice by delivering a true copy hereof to A. B. Duncan on the 9th day of February, 1923.

R. M. Duncan.

Subscribed and sworn to before me this 10th day of February, 1923. E. J. Breen, Notary Public. My Commission expires July 8, 1924. (Seal.)

[fol. 10] IN THE SUPREME COURT OF MISSOURI. IN BANC

[Title omitted]

ORDER ISSUING WRIT OF MANDAMUS—Filed March 3, 1923

Now at this day, the Court having considered and fully understood the petition heretofore filed by the said petitioner for a writ of mandamus herein, doth order that an alternative writ of mandamus issue herein, directed to the said respondent, the said writ to be returnable on the 2nd day of April, 1923, in the Court in Banc.

SUPREME COURT OF THE STATE OF MISSOURI

ALTERNATIVE WRIT OF MANDAMUS

The State of Missouri to A. B. Duncan, Judge of the Probate Court of Buchanan County, Missouri, Greeting:

Whereas, it has been represented to this Court, on the part of The Burnes National Bank of St. Joseph, Missouri, as set forth in a certain petition for a Writ of Mandamus, a copy of which petition is hereto attached and made part hereof:

Now, therefore, we being willing that due and speedy justice be done to the said petitioner in this behalf, command you, the said A. B. Duncan, Judge of the Probate Court of Buchanan County, that you do, without further delay or excuse, immediately after the receipt of this writ, make an order setting aside the order heretofore made by you on the 29th day of January, 1923, refusing to appoint said petitioner, The Burnes National Bank of St. Joseph, Missouri, [fol. 11] executor under the last will and testament of the said Mary E. Bird, deceased, and appointing Mary A. Williams, Public Administrator of Buchanan County, Missouri, administrator, with the will annexed of said estate, and that you do make an order appointing the said petitioner executor of said estate, and issue to it letters testamentary in accordance with the request in the said last will and testament of Mary E. Bird, deceased, or that you show cause,

if any you have, before the Supreme Court of Missouri en banc, on the 2nd day of April, 1923, why you should not do so.

Herein fail not at your peril.

In witness whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at my office in the City of Jefferson, this 3d day of March, 1923.

J. D. Allen, Clerk. (Seal.)

[fol. 12] In the Supreme Court of Missouri, April Term, 1923. En Banc

[Title omitted]

Answer and Return—Filed March 20, 1923

Now comes the respondent in the above entitled cause and for answer and return to the alternative writ of mandamus herein, demurs to said petition and to said alternative writ for the following reason, to-wit:

Said petition and alternative writ, and the matters and things therein stated and set forth, are not sufficient in law or equity to entitle the plaintiff to the relief asked for in said petition or to authorize the issuing of a writ of mandamus.

Chas. H. Mayer, Attorney for Respondent.

[fol. 13] In the Supreme Court of Missouri. In Banc

[Title omitted]

Submission of Cause

Come now the said parties, by attorneys, and after argument herein, submit this cause to the Court.

In the Supreme Court of Missouri. In Banc

[Title omitted]

Judgment

Now at this day, come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the petition of the said relator for a peremptory writ of mandamus herein be denied, and that the said respondent recover against the said relator his costs and charges herein expended and have therefor execution. (Opinion filed.)

[fol. 14] In the Supreme Court of Missouri. En Banc

[Title omitted]

Mandamus

Opinion—Filed January 4, 1924

The Relator filed its petition in this Court setting forth its organization as a national bank and alleging that one Mary E. Bird, a citizen of the State of Missouri and resident of the city of St. Joseph, died November 27, 1922, leaving a will which was duly admitted to probate in the Probate Court of Buchanan county, in which will she named the relator as executor; that the Federal Reserve Act, Section 9704, paragraph K, in granting certain powers to national banks, included the right to act as executors of estates; that the Federal Reserve Board, under the rules and regulations prescribed by the Federal Reserve Act, granted the petitioner the right to exercise its privileges so granted in so far as such exercise of that right was not in contravention of the state or local law; that under the Revised Statutes of Missouri for 1919, trust companies of this State are authorized to act as executors, and in fiduciary capacities; that subsequent to the probate of said will the petitioner made application to the Probate Court of Buchanan County for appointment as executor, and for the issuance of letters testamentary under the terms of the will; that January 29, 1923 the respondent, [fol. 15] Judge of said Probate Court, entered an order declining to appoint the petitioner on the grounds that under the laws of the State of Missouri, said petitioner was not authorized to act as executor. The proceedings of the Probate Court in that connection were set out in full, including the order declining to appoint the Burns National Bank as executor, and the appointment of Mary E. Williams, to be administratrix, with will annexed, of said estate. The petition thereupon prays this Court for an alternative writ of mandamus, directing the respondent Judge of the Probate Court to set aside said order appointing Mary E. Williams, and to appoint the petitioner as executor of said estate, or show cause why he had not done so.

Upon the filing of such petition this Court caused an alternative writ to be issued March 3, 1923.

The respondent then for return to the alternative writ demurred on the ground that the aforesaid petition did not state facts which would authorize the issuance of a peremptory writ of mandamus. The case, then, is to be determined upon the facts stated in the petition for an alternative writ.

I. The petitioner calls attention to Section 11, R. S. Mo. 1919, providing that after the probate of a will, letters testamentary shall be granted to the persons therein appointed executors, arguing that "persons" mentioned in the section includes corporations as well as natural persons. There can be no force in this argument unless petitioner means that this and other sections of the chapter relating

to Administration, authorize any and every corporation to act as executor or in other fiduciary relation as provided for in that chapter. It is true that in many instances where the word "person" is used in a statute, it is construed to include corporations. The use of the term applies particularly to criminal statutes where a criminal act affects the property of a person. But that construction is [fol. 16] by no means universal; it depends upon the context and the intent with which the term is employed. (30 Cyc. p. 1526; See Words & Phrases, title "Person." The entire purpose and context of Article 1 on Administration excludes the idea that "person" means corporation. Section 7, relating to persons who may administer on estates; Section 6, excluding certain persons from acting as administrator or executor; Section 36, providing the form of letters issued to an executor; in fact all the provisions of that article show that the legislature was dealing with and granting powers to natural persons.

It must be remembered that there was no common law right to make a will or appoint an executor. It is purely a matter of statutory regulation. The statute authorizing certain persons to act as executor is an enabling statute, and it must be construed according to the intent and purpose of the legislature in enacting it. The intent of the legislature to include only natural persons in the authority granted in that article appears not only in the terms of the article, but is shown by the actual grant, in another statute, of authority to trust companies to act as executors, and in other fiduciary relations. There would have been no need of such affirmative act if this chapter on Administration had granted such authority to all corporations. Before any corporation in this state can have a right to act in a fiduciary relation in administering estates there must be express authority given that kind of a corporation and that statutory authority must be construed in pari materia with the chapter relating to Administration. Certainly there is no warrant for a contention that any corporation which might be named as executor in the will would have authority to act as such unless the law creating and defining the powers of such corporation should authorize it to perform such duties. The petitioner cannot derive authority to act as executor from the article on Administration or the section of that [fol. 17] article relating to executors. It must be authorized to act through some other statute, Federal or State, giving it such authority.

II. The petitioner claims authority to act as executor under the provisions of the Federal Reserve Act. A brief filed herein by several amici curiæ, presumably representing national banks, has a good deal to say about the authority of the Federal government, quoting precedents to the effect that the Constitution of the United States and the acts of Congress, within the scope of authority delegated to them, are paramount,—the Supreme Law of the land,—and binding upon all the States; that when Congress has enacted a statute within its constitutional power, regulating and defining the powers of any agency created by Congress,—a State cannot by

any enactment nullify or abridge the powers thus granted or defined. Of course those principles are well established, and the extent of such authority is not in issue in this case.

In accordance with its constitutional authority Congress, it was held, had power to authorize the organization of national banks and invest them with whatever functions it thought necessary to make the business of the banks successful. Thus incidental authority was founded upon necessity; national banks could be empowered to perform any duties when "Congress was of the opinion that these faculties were necessary to enable the bank to perform the services which are exacted from it, and for which it was created." (First National Bank v. Fellows, 244 U. S. l. c. 420.) That quotation is taken from an earlier case and the principle applied to the section of the Federal Reserve Act authorizing banks to act in fiduciary capacities. That case is the only case cited, and, so far as we know, the only [fol. 18] case decided by the United States Supreme Court construing that feature of the Federal Reserve Act under which the petitioner asserts its right. It is mentioned often in later decisions of other courts, and the argument of petitioner is largely based upon deductions drawn from it by such other courts. We think it settles a good many questions which have arisen in relation to the act,—questions which occur in this case. It is well to note what is said there regarding the authority granted by Congress to a national bank to serve in fiduciary relations, such as executor, as necessary to enable the bank to perform the services required of it. We will notice below just what is meant by those duties in the light of the provision of the Federal Reserve Act.

III. While Congress has power, unless restrained by the Federal Constitution, to absorb to itself the entire regulation of such matters as are under consideration here, it has not done so. On the contrary, while the Federal Reserve Act authorizes National Banks to act in the capacity of executors, administrators, etc., Congress appeared to have in mind the popular protest against its supposed tendency to legislate in matters of purely local and state concern, for it limited the authority of national banks in that respect to cases where such authority was "not in contravention of the state or local law." The question at issue here is whether the exercise of the fiduciary function by National Banks authorized by that provision of the Federal Reserve Act is in contravention of the law of the State of Missouri. First, however, we must ascertain what authority is to decide that question. Is its determination peculiarly within the jurisdiction of the Federal Court? Or does this Court have authority to say whether the exercise of such functions by National Banks is in contravention of the law of this State?

[fol. 19] It has always been held that the power to regulate the acquisition and transfer of property, descents and distributions, the devolution of estates, etc., is exclusively within the jurisdiction of the State. Overly v. Gordon, 177 U. S. 214; Penoy v. Neff, 95 U. S. 714. Trustees, executors and administrators are the instruments through which the State regulates and controls certain classes of

property. This is recognized by the Federal courts in the cases just mentioned. It naturally follows that the State, by statute, has the right to say, and the state courts have the right finally to determine, what agencies may exercise such control without acting in contravention of the state law. That was expressly held by the Federal Supreme Court in the Fellows case. (244 U. S., l. c. 427-8), where Chief Justice White said:

"In other words, we are of opinion that as the particular functions in question by the express terms of the act of Congress were given only, 'when not in contravention of the State or local law,' the state court was, if not expressly, at least impliedly, authorized by Congress to consider and pass upon the question whether the power was or was not in contravention of the state law, and we place our conclusion on that ground. * * * The nature of the subject dealt with adds cogency to this view since that subject involves the action of state courts of probate in a universal sense, implying from its very nature the duty of such courts to pass upon the question and the power of the court below within the limits of state jurisdiction to settle, so far as the State was concerned, the question for all such courts by one suit, thus avoiding the confusion which might arise in the entire system of state probate proceedings and the very serious injury to many classes of society which also might be occasioned."

[fol. 20] Since that decision the Federal Reserve Act has been amended. Originally it authorized the Federal Reserve Board:

"To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe."

Section 11 (k) of the Act was amended by Congress in September, 1918, so that the provision read as follows:

"To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

"Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this Act."

It cannot be contended that Congress by this amendment took away from the courts of a State the right to interpret its own statutes

and to determine this particular question. The reasoning of the Supreme Court in the Fellows case negatives the existence of any such authority on the part of Congress.

The petitioner argues that this amendment enlarges the authority [fol. 21] of national banks, giving them authority to act in such matters where before the amendment they had none. On the contrary, the first paragraph of the amendment limits the exercise of that authority. Under the original act the authority to act as executor, etc., given to national banks was only when such function was "not in contravention of the state or local law." Under the first paragraph of the amendment it is not sufficient that it is not in contravention of the state law, but there must be competition with state institutions, authorized to act in such fiduciary capacities, before a national bank has such authority.

The petitioner calls attention to the second paragraph of the amendment quoted as further limiting the right of the state to exclude national banks from acting in such capacities, by declaring that where the State gives such authority to state banks and trust companies or other corporations "which compete with national banks" the exercise of such power "shall not be deemed to be in contravention of the state or local laws." Some courts have held this to be a legislative interpretation of the authority granted and not binding upon the courts.

Appellant says that it was not necessary for Congress to make any qualification; that it had a right to authorize national banks to act in fiduciary relations without any exceptions and regardless of the state law. It is sufficient answer to say that Congress has not seen fit to do so. On the contrary, Congress has dealt very tenderly with the supposed sensitiveness of states in regard to encroachment upon their authority. It is not contended and cannot be that that provision attempts to take away from the state courts the right to determine when the exercise of such powers is in contravention of state law, except to define one particular instance where it shall not be [fol. 22] so considered. It remains for the courts to say what is meant by the competition with national banks as mentioned in the act. That the provision relating to the contravention of state or local law is retained in the amendment shows an intent to give it some meaning, and that meaning is not taken away by the attempted definition following. If the latter paragraph should be construed to state the entire case as to when national banks should be excluded from exercising such authorities, the use of the expression "not in contravention of the state or local law" would be superfluous.

We hold, therefore, that this Court has the right and the duty to determine whether the office which the petitioner seeks to discharge is in contravention of the laws of this State.

IV. In consideration of the terms of paragraph 11 (k) of the Federal Reserve Act we must ascertain what Congress had in mind. Congress did not grant such powers to national banks because it claimed any right to provide for the custody of property which is within the constitutional control of the State. Congress had no in-

tention to trespass upon State preserves. National banks were vested with such functions because they were necessary to enable them to "perform the services which were exacted from them and for which they were created." It was a matter of surviving against unequal competition. That idea is apparent in the Act, and particularly in the amendment. Unless it was necessary to the proper discharge of its duties there was no reason why a national bank should act in fiduciary relations, and such function would not be necessary unless the bank came in competition with the State institutions which would thereby have an advantage over their national competitors. This appears in the expressions where the Act speaks of other corporations, "which come in competition with national banks" * * * "which compete with national banks." If state institu- [fol. 23] tions of like character are denied the right to exercise such functions national banks have no right to exercise them. It is in contravention of state law; that is, in contravention of the state legislative policy. It is only because national banks, by reason of an advantage given to state institutions, could not compete and survive that this authority is conferred upon them.

When Congress in the Act speaks of competition of course it means competition on equal terms with state corporations. It cannot be that Congress intended national banks to have privileges and advantages which state institutions could not enjoy in matters relating to control of estate which are peculiarly within the state authority. The entire purpose of the Act was not to give national banks an advantage but to place them upon equal terms with competitive state banks. It was said by the Federal Supreme Court in the Fellows case, l. c. 426:

"This must be since the state may not by legislation create a condition as to a particular business which would bring about actual or potential competition with the business of national banks and at the same time deny the power of Congress to meet such created condition by legislation appropriate to avoid the injury which otherwise would be suffered by the national agency. Of course, as the general subject of regulating the class of business just referred to is peculiarly within the state administration control, state regulation for the conduct of such business, if not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came in virtue of authority conferred upon them by Congress to exert such particular powers."

[fol. 24] This is a distinct recognition of our interpretation of the Act. National banks have no right to exercise the fiduciary functions enumerated in the statute unless the state has discriminated against national banks in that respect and put them at a disadvantage. If national banks, without such authority can compete successfully with state institutions, then under the terms of the Act they have no right to demand the exercise of such functions.

V. In determining whether the exercise of fiduciary capacities by a national bank is in contravention of the state law it is not necessary

to point to a specific statute which forbids the exercise of such functions by such banks or similar institutions of the State. If it is contrary to the policy of the State and plainly so appears from its statutory enactments, then it is in contravention of the state law. The legislative power of the State has not given authority to state banks to act as executors, administrators, etc., but has selected trust companies as the only and peculiar corporations to be invested with such trusts. This authority is not given to trust companies as a convenient incident to the conduct of their ordinary business. The legislature was not considering the prosperity of trust companies, but was looking for the safety of certain important trust funds which are attended with the natural insecurity and danger of dissipation, making them the especial and peculiar concern of the law. The legislative purpose was not to confer a privilege upon trust companies but to seek additional sources of security for those funds. Hence the law-making body hedged about the custodians of such funds with restrictions, conditions and securities with which only a trust company could conveniently comply,—restrictions which the state courts are powerless to impose upon national banks. National banks with [fol. 25] the regulatory provisions in the Federal Reserve Act may be just as safe as the state trust companies. With that we have no concern. The propriety and expediency of statutes are for the sole determination of the legislative body. We must declare the legislative policy as we find it.

Now let us consider for a moment what that policy is:

(a) The legislature has not given authority to act as executors and administrators to state banks, the natural inevitable competitors of national banks in the transaction of ordinary business.

(b) In giving this authority to trust companies it has provided in Section 11801 R. S. 1919, Subdivision 5, that:

"All investments made by any trust company of money received by it in any fiduciary capacity shall be at its sole risk, and for all losses of such money the capital stock and property of the company shall be absolutely liable."

except on certain unimportant conditions.

(c) Subdivision 8 of the said last mentioned section provides that the property held by a trust company in trust "shall not be mingled with the investments of the capital stock or other property belonging to such trust company or be liable for debts or obligations thereof." For the purposes of that section the trust company is required to have "a trust department in which all the business authorized by the act" shall be kept distinct and separate from its general business.

(d) Subdivision 9, of the said section, provides that, unless otherwise provided in the instrument creating the trust, on certain of the money held by the trust company in a fiduciary capacity interest shall be allowed at not less than 2% per annum, compounded annually.

(e) Section 11802 R. S. 1919, provides that the directors may set apart a trust or guaranty fund, and provides for its investment. [fol. 26] Section 11803 provides that the guaranty fund shall be absolutely pledged for the faithful performance of the duties of the trust company under the provisions of the act.

(f) Section 11838 R. S. 1919, provides that when any company now doing business in this State, or which may hereafter be organized under the provision of this article relating to trust companies,

* * * "which shall make with the bank commissioner a deposit of two hundred thousand dollars * * * shall be permitted to qualify as guardian and curator, executor, etc., without giving bond as such, and the fund so deposited is primarily liable for the obligation of the company as guardian, curator, executor, etc."

The Federal Reserve Act provides that the assets held by a national bank in a fiduciary capacity shall be segregated from the general assets of the bank and a separate set of books and records shall be kept which shall be open to inspection of the state authorities. It further provides that notes deposited or held in trust by the company "awaiting investment" shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless first set aside in the trust department in United States bonds, etc., and in the event of the failure of such bank the owners of the funds held in trust for investment shall have a lien on the bonds. It further provides that when the laws of the state require corporations acting in fiduciary capacity to deposit securities with the state authorities, national banks shall be required to make similar deposits.

It cannot be contended that these regulations in any way conform to the requirements which the state law imposes upon trust companies. The extraordinary burden which trust companies carry by acting in a fiduciary relation is shown in Subdivision 5, in Section [fol. 27] 11801, which makes all the capital stock and property of the company liable for the loss of trust funds. Nothing to compare with this appears in the Federal Reserve Act. The State requirement of trust companies further provides that money so deposited shall be a special deposit. It shall not be mingled with the investments of the capital stock nor with other money belonging to the trust company or liable for its debts, and two per cent interest shall be allowed on it. Not only must the money be kept separate and accounted for separately; it is a separate department and completely independent in its management, as if it were indeed a separate and distinct organization. When a trust company takes on the discharge of duties as executor, etc., it elects to conduct new business distinct from its trust company business, and to become peculiarly responsible for funds which have nothing to do with and cannot add to the prosperity of its ordinary business, nor make the functional discharge of its regular business any easier or more effective. The trust company might fail with complete loss to all stockholders and depositors, and yet that would not affect in the least the security

of the trust funds if the statute is complied with. A trust company, by reason of taking on this additional duty, and engaging in this outside business, is not competing with national banks as a trust company. It would be exactly the same as if the legislature should attach such a function to Probate Courts. Considering then that the legislative department of the State has not seen fit to give such authority to state banks, and has not given such authority to trust companies as an aid to the conduct of their ordinary business, but has selected trust companies to discharge such duties only on condition that they create a separate and distinct operative agency, there is no such competition with national banks, as is contemplated in [fol. 28] the Federal Reserve Act. The exercise of such functions by national banks is not necessary in the performance of the service for which they were created. We cannot admit that Congress intended to give national banks an advantage in competition with state banks.

The relator hastens to assure us that state authorities have no control whatever over national banks, except as permitted by the Congressional Act. This Court has recognized that in the recent case of State v. National Bank, 249 S. W. 619. The legislature of this State cannot, by any means, require on the part of national banks a compliance with the conditions mentioned which reflect the legislative policy of the state and national banks, restrained by the law of their organization cannot comply with them. Thus it plainly appears that the relator cannot act as executor in this case because the exercise of such function would be in contravention of the State law.

VI. The authorities support the conclusion we have reached. The most important case, of course, is the First National Bank v. Fellows (244 U. S. 416) referred to above. That case arose in Michigan where the Attorney-General brought a quo warranto proceeding against a national bank (92 Mich. 640), questioning its right to act as trustee, executor, etc. The Supreme Court of Michigan held by a majority ruling, (a) that the provision in the Federal Reserve Act 11 (k) was not in contravention of the State law, neither of any express provision of the statute, nor of the legislative policy of the State, (b) but that the exercise of such function by a national bank was unconstitutional. The United States Supreme Court, where the case went on writ of error, gave special emphasis as quoted above, to the right of the State to determine the question [fol. 29] of contravention. The Court said, (244 U. S., l. c. 425), referring to the Michigan decision: "In view of the express ruling that the enjoyment of the powers in question by the national bank cannot be in contravention of the state law," the State Court proceeded upon the erroneous assumption that because a particular function was subject to be regulated by state law, "Congress was without power to give a national bank the right to carry on such functions." The United States Court then reversed the ruling, not because the Michigan Supreme Court erred in determining the question of contravention, but erred in holding that Congress had no constitutional right to invest national banks with such functions.

The Court then further indicated a deference to the power of the State to control its own affairs, as follows: (l. c. 426-427):

"That the statute subjects the right to exert the particular functions which it confers on National Banks to the administrative authority of the reserve board, giving besides to that board power to adopt rules regulating the exercise of the functions conferred, thus affording the means of coordinating the functions when permitted to be exercised. It charged all national banks with reasonable and nondiscriminating provisions regulating their exercise as to said corporations, the whole to the end that harmony and the concordant exercise of national and state power might result."

This is a definite statement of the United States Supreme Court that the rules regulating the exercise of the functions under consideration provided by the Reserve Board must coordinate with the state regulations. No doubt the conditions in Section 11 (k), were framed to meet the usual requirements and regulations to be expected in State statutes "to the end that harmony and the concordant exercise of national and state power might result." This seems to be a plain indication that if the State has regulations and [fol. 30] exacts conditions for the exercise of these fiduciary powers, with which a national bank cannot comply and with which the State legislature is powerless to compel compliance, then the exercise of such functions by a national bank is in contravention of the state law.

The case of the People v. Brady, 271 Ill. 100, is referred to in the cited cases and furnishes an important illustration of the subject. That was a mandamus proceeding at the relation of a national bank, asking a peremptory writ requiring the issuance to relators of a certificate of qualification to act as trustee, executor, etc. The Supreme Court of Illinois, in a very able and lucid opinion, held that the exercise of functions prescribed in Section 11 (k) were in contravention of the state law, pointing out as regulating the exercise of such functions the Illinois Statutes which could not be applied to national banks. The opinion also denies the constitutional authority of Congress to regulate and provide for the exercise of fiduciary functions because they come strictly within the state control.

That decision was rendered before the Fellows case got to the Supreme Court. After that ruling the same national bank brought another mandamus proceeding in the Illinois State Court on the theory that in the Fellows case the United States Supreme Court overruled the conclusion reached by the Illinois Court in the Brady case. That case came before the Supreme Court of Illinois. (State ex rel. v. Russell, 283 Ill. 520). The Court then refused to grant the relief prayed on the ground that the former ruling was res adjudicata and indicated (l. c. 524), that if it were not for the conclusiveness of the former judgment the court would be obliged to rule differently, conceding that the former judgment was erroneous. In that obiter statement the Illinois Court shows a misunderstanding of the point decided in the Fellows case. The only question con- [fol. 31] sidered in the Fellows case and the only point upon which

the Michigan Supreme Court was overruled was as to the constitutionality of the provision in the Federal Act. The Illinois Court evidently failed to notice that the Federal Supreme Court did not pass upon the question of whether the Federal Act was in contravention of the law of Michigan so as to affect that question when applied to the Illinois law. As a matter of fact, under the ruling in the Fellows case, the judgment in the Brady case was not erroneous and would have been sustained by the Federal Supreme Court if the question had not got before it on the sole ground that the exercise of such powers by national banks in Illinois was in contravention of the State Law. So that the ruling in the Brady case is still the law of Illinois on that question.

The case of Aquidneck National Bank of Newport v. Jennings, 117 Atl. 743, is where the Supreme Court of Rhode Island held that the provisions of Section 11 (k) were in contravention of the state law of Rhode Island. The Court points out the statutes regulating the exercise of fiduciary relations such as are mentioned in Section 11 (k), and holds that the State cannot impose such regulations upon national banks and therefore the exercise of such functions by a national bank is in contravention of the state law. Rhode Island, like the State of Missouri, did not grant such powers to the state banks. The opinion says (l. c. 746):

"The extension by the General Assembly of this power of Trust Companies alone, of all corporations, is plainly because the provisions governing their creation and their regulation safeguard in a peculiar manner the rights of those beneficially interested in such trusts."

The same may be said of the Missouri Statutes in relation to that [fol. 32] matter; the selection of trust companies alone and the peculiar manner of managing trust funds required, show that it is the legislative policy of the State that general banking institutions shall not be endowed with such functions. The brief of amici curiæ, calls attention to recent statutes of this State giving Trust Companies certain additional powers which make them competitors of banks in respects where they were not such competitors before. This does not alter the attitude of the State towards such institutions. Trust Companies are selected as fiduciary agents doubtless because the legislature deemed them best fitted to met the rigid exactions which the statute imposes upon the exercise of such trusts.

In the Appeal of Henry W. Woodbury, 78 N. H. p. 50, the question came before the Supreme Court of New Hampshire. In that case there was an express statute forbidding the appointment of banking companies and trust companies as administrators and executors. The Court held that the exercise of the fiduciary functions mentioned in 11 (k) of the Federal Reserve Act were in contravention of the State Law. Of course there is no express denial in the Missouri statute, but the denial to banks of such functions is clearly implied and as emphatic as if there had been express denial.

No cases have been cited by petitioner in support of their position,

when regulations and restrictions such as are imposed by the Missouri legislature are present, where it has been held that the provisions of the Federal Reserve Act are not in contravention of the state law.

The Supreme Court of Pennsylvania, in case of In Re Turner Estate, 120 Atl. 701, held that the provisions of the Federal Act were not in contravention of the law of Pennsylvania, on the ground that the regulation of such fiduciary functions was in harmony with the state regulations. There were no such stringent regulations as are provided in our statute. (Hamilton v. State, 94 Conn. 648. In Re Estate of Stanchfield. 171 Wis. 553; In Re Mullinax, 179 N. Y. [fol. 33] Supp. 90; are cited.) In each case the exercise of such powers was expressly granted to state institutions which act is direct and general competition with national banks in the exercise of their ordinary functions.

In the regulation of trust funds the Federal Act is in direct conflict with the Missouri statute, above pointed out. Necessarily there would be a want of that "harmony and concordant exercise of national and state powers" which Chief Justice White, in the Fellows case held was necessary in such cases.

We think that both reason and authority support the view that the exercise of fiduciary functions mentioned in Federal Reserve Act, 11 (k), are in contravention of the law of Missouri, the legislative policy, and the express statutes.

The peremptory writ is therefore denied. All concur.

J. T. White, Judge.

[fol. 34] In the Supreme Court of the State of Missouri, October Term, 1923

[Title omitted]

Petition for Writ of Error—Filed January 18, 1924

Comes now The State of Missouri, at the Relation of The Burnes National Bank of St. Joseph, petitioner above named, and respectfully shows to the court that in the record and proceedings and rendition of the judgment in the above cause by the above entitled court, said court being the highest court of the State of Missouri in which a decision could be had in said cause, manifest error has occurred, greatly to the disadvantage of petitioner, whereby petitioner considers itself aggrieved; that in said record and proceedings it will appear that there was drawn in question the validity of a statute of the United States and of an authority exercised under the United States, and the decision was against the validity of said statute and of said authority, all of which is fully apparent in the records and proceedings of said cause and specifically set forth in the assignment of errors filed herewith.

Wherefore, petitioner prays that a writ of error be allowed from said decision and judgment to the Supreme Court of the United States, and that a transcript of the record, proceedings and papers

upon which said decision and judgment were made, duly authenticated, be ordered sent to the Supreme Court of the United States at [fol. 35] Washington, D. C., under the rules of said court in such cases made and provided, that the same may be inspected and corrected as according to law and justice should be done.

John C. Landis, Jr., Justice D. Bowersock, William T. Jones,
Attorneys for Petitioner, Plaintiff in Error.

The writ of error as prayed for in the foregoing petition is hereby allowed this 18th day of January, 1924, and the bond for that purpose is fixed at the sum of $1,000.00.

Dated at Jefferson City, Missouri, this 18th day of January, 1924.

A. M. Woodson, Chief Justice, Supreme Court of the State of Missouri.

[File endorsement omitted.]

[fol. 36] In the Supreme Court of the State of Missouri

[Title omitted]

Assignment of Errors—Filed January 18, 1924

Now comes The State of Missouri, at the Relation of The Burnes National Bank of St. Joesph, and files herewith its petition for a writ of error and says that there are errors in the record and proceedings of the above entitled cause, and for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignment:

1. The Supreme Court of Missouri erred in holding that the second paragraph of Section 11 (k) of the Act of Congress of December 23, 1913, (38 Stat. 251, Chap. 6) known as the Federal Reserve Act, as amended by Act of Congress of September 26, 1918, (40 Stat. 967, Chap. 177) is invalid and in deciding against the validity thereof.

2. The Supreme Court of Missouri erred in holding that the authority granted to relator under said Section 11 (k) of said Act of Congress, as amended, and exercised by relator under the United States by virtue of said Act, is invalid and in contravention of the laws of the State of Missouri, and in deciding against the validity of said authority.

3. The Supreme Court of Missouri erred in holding that the question whether the authority exercised by relator under said Section [fol. 37] 11 (k), as amended, is in contravention of the laws of the State of Missouri, is for the courts of the State to determine, and in holding that the authority exercised by relator is invalid.

4. The Supreme Court of Missouri erred in holding that the relator had no authority to exercise the functions enumerated in said

Section 11 (k), as amended, unless the State of Missouri had discriminated against national banks, and that the State had not so discriminated, thereby deciding that said section, as amended, is invalid.

5. The Supreme Court of Missouri erred in denying to the relator the right to exercise, in the State of Missouri, the functions enumerated in said Section 11 (k), as amended.

6. The Supreme Court of Missouri erred in holding that the authority to act as executor granted to relator under said Section 11 (k) of said Act of Congress, as amended, and exercised by relator under the United States by virtue of said Act, is invalid and in contravention of the laws of the State of Missouri, and in deciding against the validity of said authority,

7. The Supreme Court of Missouri erred in holding that the question whether the authority to act as executor exercised by relator under said Section 11 (k), as amended, is in contravention of the laws of the State of Missouri, is for the courts of the State to determine, and in holding that the authority to act as executor exercised by relator is invalid.

8. The Supreme Court of Missouri erred in holding that the relator had no authority to exercise the function of acting as executor as set out in said Section 11 (k), as amended, unless the State of Missouri had discriminated against national banks, and that the State had not so discriminated, thereby deciding that said section, as amended, is invalid.

[fol. 38] 9. The Supreme Court of Missouri erred in denying to the relator the right to exercise, in the State of Missouri, the function of acting as executor as set out in said Section 11 (k), as amended.

For which errors, the petitioner, The State of Missouri at the Relation of The Burnes National Bank of St. Joseph, prays that the said judgment of the Supreme Court of the State of Missouri be reversed and a judgment rendered in favor of said petitioner.

John C. Landis, Jr., Justin D. Bowersock, William T. Jones,
Attorneys for Petitioner, Plaintiff in Error.

[File endorsement omitted.]

[fol. 39] IN THE SUPREME COURT OF THE STATE OF MISSOURI

[Title omitted]

ORDER ALLOWING WRIT OF ERROR

The above entitled cause coming on to be heard upon the petition of The State of Missouri, at the Relation of The Burnes National Bank of St. Joseph, for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, and upon examination of said petition and the record in said matter, and

desiring to give the petitioner an opportunity to present in the Supreme Court of the United States, the questions presented by the record in said cause;

It is ordered that a writ of error be and the same is hereby allowed to this court from the Supreme Court of the United States, and that the bond presented by said petitioner be and the same is hereby approved.

A. M. Woodson, Chief Justice Supreme Court of the State of Missouri. January 18, 1924.

[fol. 40] WRIT OF ERROR

UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Supreme Court before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between The State of Missouri, at the Relation of The Burnes National Bank of St. Joseph, petitioner, and A. B. Duncan, Judge of the Probate Court of Buchanan County, Missouri, respondent, wherein was drawn in question the validity of a statute of and an authority exercised under the United States, and the decision was against the validity of such statute and such authority, a manifest error hath happened to the great damage of the said petitioner as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

[fol. 41] Witness, the Hon. William H. Taft, Chief Justice of the United States, this 18th day of January, in the year of our Lord, one thousand nine hundred twenty four.

Edwin R. Durham, Clerk of the United States District Court for the Western District of Missouri. (Seal of the United States District Court of Missouri, Western Division, Western District.)

The above writ is allowed by A. M. Woodson, Chief Justice Supreme Court of Missouri.

[fols. 42 & 42a] CITATION—In usual form, showing service on Chas. W. Mayer; omitted in printing

---

[fol. 43] RETURN TO WRIT

UNITED STATES OF AMERICA,
Supreme Court of Missouri, ss:

In obedience to the commands of the within writ, I hereby transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Missouri, in the City of Jefferson City, Missouri, this January 18th, 1924.

J. D. Allen, Clerk Supreme Court of Missouri. (Seal of the Supreme Court of Missouri.)

[fol. 44] CERTIFICATE OF LODGMENT

STATE OF MISSOURI, ss:

SUPREME COURT

I, J. D. Allen, Clerk of the said court, do hereby certify that there was lodged with me as such clerk on January 18th, 1924, in the matter of The State of Missouri at the Relation of The Burnes National Bank of St. Joseph, petitioner, v. A. B. Duncan, Judge of the Probate Court of Buchanan County, Missouri, respondent,

1. The original bond, of which a copy is herein set forth;

2. Two copies of the writ of error as herein set forth, one for each defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Jefferson City, Missouri, this January 18th, 1924.

J. D. Allen, Clerk Supreme Court of Missouri. (Seal of the Supreme Court of Missouri.)

[fols. 45 & 46] BOND ON WRIT OF ERROR FOR $1,000—Approved January 18, 1924; omitted in printing

[fol. 47] IN THE SUPREME COURT OF THE STATE OF MISSOURI

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD.—Filed January 18, 1924

To the clerk of the above named court:

For use on the Writ of Error in the above entitled cause, this day allowed, you will please prepare a transcript of all the records and proceedings in the above entitled cause, including:

1st. Petition for Writ of Mandamus.

2nd. Order allowing petition and granting alternative Writ.

3rd. Alternative Writ of Mandamus.

4th. Return and answer of Respondent in the nature of a demurrer to the Alternative Writ.

5th. Order of submission.

6th. Judgment of the Court.

7th. Opinion of the Court.

8th. Petition for Writ of Error.

9th. Assignment of errors filed therewith.

10th. Order allowing Writ of Error.

11th. Writ of Error with allowance thereof.

12th. Citation.

13th. Proof of service of citation.

14th. Return to Writ of Error.

15th. Certificate of lodgment.

16th. Bond on Writ of Error and order approving same.

[fol. 48] 17th. This Præcipe.

18th. Authentication of transcript.

John C. Landis, Jr., Justin D. Bowersock, William T. Jones,
Attorneys for Petitioner and Plaintiff in Error.

I, attorney of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above præcipe at St. Joseph, Missouri, this eighteenth day of January, 1924.

Charles H. Mayer, Attorney for Defendant in Error.

I desire no further parts of the record, except the above.

Chas. H. Mayer.

[File endorsement omitted.]

[fol. 49] STATE OF MISSOURI, ss:

SUPREME COURT

CLERK'S CERTIFICATE

I, J. D. Allen, Clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of The State of Missouri, at the Relation of The Burnes National Bank of St. Joseph, petitioner, v. A. B. Duncan, Judge of the Probate Court of Buchanan County, Missouri, respondent, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Jefferson City, Missouri, this January 18th, 1924.

J. D. Allen, Clerk Supreme Court of Missouri. (Seal of the Supreme Court of Missouri.)

Endorsed on cover: File No. 30,072. Missouri Supreme Court. Term No. 762. The State of Missouri at the relation of The Burnes National Bank of St. Joseph, plaintiff in error, vs. A. B. Duncan, Judge of the Probate Court of Buchanan County, Missouri. Filed January 22nd, 1924. File No. 30,072.

FILED
MAR 14 1924
WM. R. STANSB
CLE

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

THE STATE OF MISSOURI, AT THE RELATION OF THE BURNES NATIONAL BANK OF ST. JOSEPH, MISSOURI,
Plaintiff in Error,

v.

No. 762

A. B. DUNCAN, JUDGE OF THE PROBATE COURT OF BUCHANAN COUNTY, MISSOURI,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

Brief of Plaintiff in Error.

JOHN C. LANDIS, JR.,
JUSTIN D. BOWERSOCK,
WILLIAM T. JONES,
Attorneys for Plaintiff in Error.

HENRY L. MCCUNE,
ARMWELL L. COOPER,
I. P. RYLAND,
SAMUEL MCREYNOLDS,
of Counsel.

John C. Bovard, Printer, 809 Baltimore Ave., Kansas City, Mo.

INDEX.

	Page
Introduction	1
Statement	2- 5
Specification of Errors	6- 7
Points and Authorities	8-10
Argument	11-31

I. The enactments of Congress within its jurisdiction are the supreme law of the land, and paramount to any state law or authority 11

II. Congress has jurisdiction to establish and regulate national banks, and its action in that regard, if constitutional, is entirely independent of and superior to all state laws 13

III. The Act of Congress granting trust powers to national banks is constitutional and such power cannot be nullified, impeded, burdened or controlled by state law except as permitted by Congress 14

IV. The powers granted to relator are not in contravention of State or local law 15

1. This is not a state question 16
2. There is no law in Missouri inconistent with the appointment of a national bank as executor 18
3. The amendment to the Federal Reserve Act forecloses all question of the power of relator to act as executor in Missouri 21
4. The amendment of 1918, of the Federal Reserve Act is a legislative declaration and clarification of the law as originally enacted 24
5. The laws of Missouri permit the exercise of trust powers, including the right to act as executor to state banks, trust companies and other corporations that compete with national banks 25

INDEX (Continued)

Page

V. Seemingly contrary authorities distinguished 28

1. The Illinois court rendered an erroneous judgment, according to its own subsequent opinion 28

2. The New Hampshire case is correctly decided because the power sought to be enforced was prohibited by local law 29

3. The decision in the Rhode Island case is governed by peculiar local law 29

VI. The effect of the decision of the Missouri Supreme Court is and will be to nullify in the state of Missouri, section 11 (k) Federal Reserve Act 30

Appendix 32-36

Opinion of Assistant Attorney General of the State of Missouri 32

TABLE OF CASES CITED:

	Page
Andrews v. *Hovey*, 124 U. S., 694, 716	9-17
Appeal of Woodbury, 78 N. H., 50, 96 Atl., 299	10-29
Aquidneck National Bank v. *Jennings*, 117 Atl., 743, (R. I.)	10-29
Davis v. *Elmira Savings Bank*, 161 U. S., 275 16 S. C. Rep., 502	8-13
Denny v. *Jefferson County*, 272 Mo., 486	9-26
Easton v. *Iowa*, 188 U. S., 220, 23 S. C. Rep., 288	8-13
Farmers Bank v. *Dearing*, 91 U. S., 29	8-13
Farmers & Traders' Bank v. *Harrison*, 57 Mo., 503, 513	9-19
Fellows v. *First National Bank*, 192 Mich., 640, 159 N. W., 335	9-24
Fidelity National Bank and Trust Company v. *Enright*, 264 Fed., 236	9-24
First National Bank v. *Fellows*, 244 U. S., 416, 37 S. C. Rep., 734	9-14-16-24-28-31-33
Hamilton v. *State*, 94 Conn., 648, 110 Atl., 54	9-23
In Re Mollineaux, 179 N. Y. Supp., 90	9-22
McCulloch v. *Maryland*, 4 Wheat., 316	8-11-13-14-33
Mondue v. *N. Y. N. H. & H. R. Co.*, 223 U. S., 1, 32 S. C. Rep., 169	8-12
Muth v. *St. Louis Trust Co.*, 88 Mo. App., 596, 602	9-27
Northern Pac. Ry. Co. v. *North Dakota*, 250 U. S., 135, 39 S. C. Rep,. 502	8-12
Osborn v. *Bank*, 9 Wheat., 738	8-13-14-33
People v. *Brady*, 271 Ill., 100, 110 N. E., 864	10-28-29
People v. *Russell*, 283 Ill., 520, 119 N. E., 617	10-29
Scott v. *McNeal*, 154 U. S., 34, 45	9-17
Shockley v. *Fisher*, 75 Mo., 498, 501	9-19
Smith v. *Alabama*, 124 U. S., 465	8-12
Stanchfield Estate, 171 Wis., 553, 178 N. W., 310	9-22
The J. E. Rumbell, 148 U. S., 1, 17	9-17
Turner's Estate, 120 Atl., 701	9-20-23
Van Reed v. *Peoples National Bank*, 198 U. S., 554, 25 S. C. Rep., 775	8-14

(30072)

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

THE STATE OF MISSOURI, AT THE RELATION OF THE BURNES NATIONAL BANK OF ST. JOSEPH, MISSOURI,
Plaintiff in Error,

v. No. 762

A. B. DUNCAN, JUDGE OF THE PROBATE COURT OF BUCHANAN COUNTY, MISSOURI,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

Brief of Plaintiff in Error.

This is an original proceeding in mandamus, filed in the Supreme Court of Missouri, to direct the respondent, Probate Judge of Buchanan County, to grant letters testamentary to the relator, plaintiff in error, a national banking association located in St. Joseph. The Supreme Court of Missouri denied the petition and the case is here on writ of error. A petition for a writ of certiorari has also been filed in this court because of uncertainty as to the proper method of review. It is submitted herewith.

STATEMENT.

By Section 11 (k) of the Act of December 23, 1913, (38 Stat. 251, Chap. 6) known as the Federal Reserve Act, Congress enacted that the Federal Reserve Board shall be authorized and empowered:

> "To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe."

U. S. Comp. Stats. 1916, Sec. 9794.

This section was amended by Act of September 26, 1918 (40 Stat. 967, Chap. 177) so as to empower said Board as follows:

> "To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.
>
> Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this Act.

National banks exercising any or all of the powers enumerated in this subsection shall segregate all assets held in any fiduciary capacity from the general assets of the bank and shall keep a separate set of books and records showing in proper detail all transactions engaged in under authority of this subsection. Such books and records shall be open to inspection by the State authorities to the same extent as the books and records of corporations organized under State law which exercise fiduciary powers, but nothing in this Act shall be construed as authorizing the State authorities to examine the books, records, and assets of the national bank which are not held in trust under authority of this subsection.

No national bank shall receive in its trust department deposits of current funds subject to check or the deposit of checks, drafts, bills of exchange, or other items for collection or exchange purposes. Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities approved by the Federal Reserve Board.

In the event of the failure of such bank the owners of the funds held in trust for investment shall have a lien on the bonds or other securities so set apart in addition to their claim against the estate of the bank.

Whenever the laws of a State require corporations acting in a fiduciary capacity, to deposit securities with the State authorities for the protection of private or court trusts, national banks so acting shall be required to make similar deposits and securities so deposited shall be held for the protection of private or court trusts, as provided by the State law.

National banks in such cases shall not be required to execute the bond usually required of individuals if State corporations under similar circumstances are exempt from this requirement.

National Banks shall have power to execute such bond when so required by the laws of the State.

In any case in which the laws of a State require that a corporation acting as trustee, executor, administrator, or in any capacity specified in this section, shall take an oath or make an affidavit, the president, vice president, cashier, or trust officer of such national bank may take the necessary oath or execute the necessary affidavit.

It shall be unlawful for any national banking association to lend any officer, director, or employee any funds held in trust under the powers conferred by this section Any officer, director, or employee making such loan, or to whom such loan is made, may be fined not more than $5000.00, or imprisoned not more than five years, or may be both fined and imprisoned, in the discretion of the court.

In passing upon applications for permission to exercise the powers enumerated in this subsection, the Federal Reserve Board may take into consideration the amount of capital and surplus of the applying bank, whether or not such capital and surplus is sufficient under the circumstances of the case, the needs of the community to be served, and any other facts and circumstances that seem to it proper, and may grant or refuse the application accordingly; Provided, that no permit shall be issued to any national banking association having a capital and surplus less than the capital and surplus required by State law of State banks, trust companies, and corporations exercising such powers."

U. S. Comp. Stats. 1916 (1919 Supp.) p. 2263.

Relator applied for and received the permit and authority of the Federal Reserve Board to exercise the designated fiduciary powers (Trans., p. 2). Thereafter, having been named as executor in a duly executed and probated will, relator made application to the defendant in error, the

Probate Judge having jurisdiction of the estate, for the issuance of letters testamentary to it, under the terms of said will (Trans., p. 2). The defendant in error declined by order to issue such letters on the sole ground "that under the laws of the State of Missouri, national banks are not authorized or empowered to act as executors" (Trans., p. 3).

There being no appeal, under the laws of Missouri, from such order, relator filed in the Supreme Court of the State a petition for a writ of mandamus to require defendant in error to issue letters to relator (Trans., p. 1). After the issuance of an alternative writ and the filing of a return thereto, the Supreme Court of Missouri denied the petition and refused to grant a peremptory writ (Trans., p. 7). The record has been duly brought to this court for review (Trans., pp. 19-25).

The sole question is, whether the exercise by the relator of the power to act as executor is in contravention of the laws of Missouri, it being pleaded and not denied that trust companies are engaged in active competition in the general banking business with national banks in Missouri, and are authorized by the laws of the State to act as executor (Trans., p. 2).

SPECIFICATION OF ERRORS.

1. The Supreme Court of Missouri erred in holding that the second paragraph of Section 11 (k) of the Act of Congress of December 23, 1913, (38 Stat. 251, Chap. 6) known as the Federal Reserve Act, as amended by Act of Congress of September 26, 1918 (40 Stat. 967, Chap. 177), is invalid and in deciding against the validity thereof.

2. The Supreme Court of Missouri erred in holding that the authority granted to relator under said Section 11 (k) of said Act of Congress, as amended, and exercised by relator under the United States by virtue of said Act, is invalid and in contravention of the laws of the State of Missouri, and in deciding against the validity of said authority.

3. The Supreme Court of Missouri erred in holding that the question whether the authority exercised by relator under said Section ~~(fol. 37)~~ 11 (k), as amended, is in contravention of the laws of the State of Missouri, is for the courts of the State to determine, and in holding that the authority exercised by relator is invalid.

4. The Supreme Court of Missouri erred in holding that the relator had no authority to exercise the functions enumerated in said Section 11 (k), as amended, unless the State of Missouri had discriminated against national banks, and that the State had not so discriminated, thereby deciding that said section as amended, is invalid.

5. The Supreme Court of Missouri erred in denying to the relator the right to exercise, in the State of Missouri, the functions enumerated in said Section 11 (k), as amended.

6. The Supreme Court of Missouri erred in holding that the authority to act as executor granted to relator under said Section 11 (k) of said Act of Congress, as amended, and exercised by relator under the United States by virtue of said Act, is invalid and in contravention of the laws of the State of Missouri, and in deciding against the validity of said authority.

7. The Supreme Court of Missouri erred in holding that the question whether the authority to act as executor exercised by relator under said Section 11 (k), as amended, is in contravention of the laws of the State of Missouri, is for the courts of the State to determine, and in holding that the authority to act as executor exercised by relator is invalid.

8. The Supreme Court of Missouri erred in holding that the relator had no authority to exercise the function of acting as executor as set out in said Section 11 (k), as amended, unless the State of Missouri had discriminated against national banks, and that the State had not so discriminated, thereby deciding that said section, as amended, is invalid.

~~(fol. 99)~~ 9. The Supreme Court of Missouri erred in denying to the relator the right to exercise, in the State of Missouri, the function of acting as executor as set out in said Section 11 (k), as amended.

POINTS AND AUTHORITIES.

I.

An Act of Congress, within a field covered by its constitutional power, fully appropriates that field and is made by the terms of the Constitution the supreme law of the land.

McCulloch v. *Maryland*, 4 Wheat. 316;
Northern Pac. Ry. Co. v. *North Dakota*, 250 U. S. 135, 39 S. C. Rep. 502;
Smith v. *Alabama*, 124 U. S. 465;
Mondu v. *N. Y. N. H. & H. R. C.*, 223 U. S. 1, 32 S. C. Rep. 169.

II.

Congress has complete constitutional power to establish and regulate national banks.

McCulloch v. *Maryland*, 4 Wheat. 316;
Osborn v. *Bank*, 9 Wheat. 738;
Davis v. *Elmira Savings Bank*, 161 U. S. 275, 16 S. C. Rep. 502;
Farmers Bank v. *Dearing*, 91 U. S. 29;
Easton v. *Iowa*, 188 U. S. 220, 23 S. C. Rep. 288;
Van Reed v. *Peoples National Bank*, 198 U. S. 554, 25 S. C. Rep. 775.

III.

The Act of Congress granting trust powers to national banks is constitutional and cannot be nullified or controlled by state authority.

First National Bank v. *Fellows*, 244 U. S. 416, 37 S. C. Rep. 734;

IV.

Such grant is not in contravention of the laws of Missouri.

Farmers' & Traders' Bank v. *Harrison*, 57 Mo. 503, 513;
Shockley v. *Fisher*, 75 Mo. 498, 501;
In re Mollineaux, 179 N. Y. Supp. 90;
Stanchfield's Estate, 171 Wis. 553, 178 N. W. 310;
Hamilton v. *State*, 94 Conn. 648, 110 Atl., 54;
Turner's Estate, 120 Atl. 701;
Fidelity National Bank and Trust Company v. *Enright*, 264 Fed. 236;
Fellows v. *First National Bank*, 192 Mich. 640, 159 N. W. 335;
Denny v. *Jefferson County*, 272 Mo. 436;
Muth v. *St. Louis Trust Co.*, 88 Mo. App. 596, 602.
First National Bank v. *Fellows, Supra.*
Andrews v. *Hovey*, 124 U. S. 694, 716;
The J. E. Rumbell, 148 U. S. 1, 17;
Scott v. *McNeal*, 154 U. S. 34, 45.

V.

Apparently adverse decisions are distinguishable.

People v. *Brady*, 271 Ill. 100, 110 N. E. 864;

People v. *Russell*, 283 Ill. 520, 119 N. E. 617;

Appeal of Woodbury, 78 N. H. 50, 96 Atl. 299;

Aquidneck National Bank v. *Jennings*, 117 Atl. 743. (R. I.)

ARGUMENT.

I.

When Congress enters any field over which it is given jurisdiction by the constitution, it appropriates that field to the fullest extent necessary to insure the complete exercise of its sovereignty. Its enactments are the supreme law of the land, paramount to any state law or authority.

In *McCulloch* v. *Maryland,* 4 Wheat. 316, Chief Justice Marshall established this fundamental doctrine of constitutional law as follows (p. 426):

> "This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them."

In reaching this conclusion, he says (p. 405):

> "* * * The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, 'this constitution, and the laws of the United States, which shall be made in pursuance thereof,' 'shall be the supreme law of the land,' and by requiring that the members of the State Legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, 'anything in the constitution or laws of any State, to the contrary notwithstanding.'"

This principle has always been recognized and followed by the Supreme Court. In *Northern Pac. Ry. Co.* v. *North Dakota*, 250 U. S., 135, 39 S. C. Rep., 502, Chief Justice White says:

> "The elementary principle that under the Constitution the authority of the government of the United States is paramount when exerted as to subjects concerning which it has the power to control, is indisputable. This being true, it results that although authority to regulate within a given sphere may exist in both the United States and in the states, when the former calls into play constitutional authority within such general sphere the necessary effect of doing so is, that to the extent that any conflict arises the state power is limited, since in case of conflict that which is paramount necessarily controls that which is subordinate."

In *Smith* v. *Alabama*, 124 U. S., 465, Mr. Justice Matthews, after laying down the principle that the power of Congress is paramount says, (p. 473):

> "It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority."

To the same effect is:

Mondou v. *N. Y. H. & H. R. Co.*, 223 U. S., 1, 32 S. C. Rep., 169.

II.

Congress has jurisdiction to establish and regulate national banks, and its action in that regard, if constitutional, is entirely independent of and superior to all state laws.

This is the precise question determined in *McCulloch* v. *Maryland, supra,* and again in *Osborn* v. *Bank*, 9 Wheat., 738.

The principle is restated by Mr. Justice White, in *Davis* v. *Elmira Savings Bank,* 161 U. S., 275, 16 S. C. Rep., 502, as follows, (p. 283):

> "National banks are instrumentalities of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impaires the efficiency of these agencies of the federal government to discharge the duties for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court."

Farmers Bank v. *Dearing,* 91 U. S., 29, holds that the states can exercise no control over national banks nor in anywise affect their operation and that the states cannot retard, impede, hinder or control them.

Easton v. *Iowa,* 188 U. S., 220, 23 S. C. Rep., 288, holds that the operations of national banks cannot be limited or controlled by state legislation.

In *Van Reed* v. *Peoples National Bank,* 198 U. S., 554, 25 S. C. Rep., 775, Mr. Justice Day thus expresses the doctrine, (p. 557):

> "The right of Congress to determine to what extent a state court shall be permitted to entertain actions against national banks, and how far these institutions shall be subject to state control, is undeniable. National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress, and are not to be interfered with by state legislative or judicial action, except so far as the law-making power of the government may permit."

III.

The Act of Congress granting trust powers to national banks is constitutional and such power cannot, therefore, be nullified, impeded, burdened or controlled by state law or authority, except as permitted by Congress.

This has been definitely and conclusively decided by the Supreme Court in *First National Bank* v. *Fellows,* 244 U. S., 416, 37 S. C. Rep, 734. The constitutionality of the Act is beyond question. Chief Justice White, in discussing *McCulloch* v. *Maryland* and *Osborn* v. *Bank,* said:

> "What those cases established was that although a business was of a private nature and subject to state regulation, if it was of such a character as to cause it to be incidental to the successful discharge by a bank chartered by Congress of its public functions, it was competent for Congress to give the bank the power to exercise such private business in co-operation with or as part of its public authority. Manifestly this ex-

cluded the power of the state in such case, although it might possess in a general sense, authority to regulate such business, to use that authority to prohibit such business from being united by Congress with the banking function, since to do so would be but the exertion of state authority to prohibit Congress from exerting a power which, under the Constitution, it had a right to exercise. From this it must also follow that even although a business be of such a character that it is not inherently considered susceptible of being included by Congress in the powers conferred on national banks, that rule would cease to apply if, by state law, state banking corporations, trust companies, or others which, by reason of their business are rivals or quasi rivals of national banks, are permitted to carry on such business. This must be, since the state may not by legislation create a condition as to a particular business which would bring about actual or potential competition with the business of national banks, and at the same time deny the power of Congress to meet such created condition by legislation appropriate to avoid the injury which otherwise would be suffered by the national agency."

IV.

Such powers have been granted to relator in so far as they are not in contravention of state or local law, and the power to act as executor (included therein) is not in contravention of the laws of Missouri.

The fact that the Federal Reserve Board has duly granted to the relator all the powers covered by the Federal Reserve Act as amended, is not controverted. The sole contention is that the power to act as executor is in contravention of the laws of Missouri, and hence is expressly ex-

cluded from the terms of the grant. There is no possible basis for such contention.

1. This is a federal and not a state question. In many cases, doubtless, the determination of what may be the law of a state is primarily for the state tribunals. In the present controversy, however, the primary question is not what the law of the state may be, but what is the meaning and force of an Act of Congress. Congress has here provided for the exercise of certain functions "when not in contravention of state or local law" and has laid down certain conditions under which it "shall not be deemed to be in contravention of state or local law *within the meaning of this Act.*"

Manifestly, the fundamental question is what intention Congress expressed by the language of the Act. The law of the state enters into consideration only incidentally as affecting that expressed intention. It might well be that an act would, as a mere question of state law, contravene such law, and yet not do so *within the meaning of the Act of Congress.* Any other conclusion would, in the language of Chief Justice White, in *First National Bank* v. *Fellows, supra,* permit "the exertion of state authority to prohibit Congress from exerting a power which, under the constitution, it had a right to exercise."

If this were not true, a state might enact a law expressly forbidding national banks to act as executor, and the State Supreme Court might hold that the exercise of such power was therefore in contravention of state law. It is not possible that an Act of Congress should be thus subject to the legislative or judicial power of each state, since, as said by Chief Justice White, "the state may not by legislation create a condition as to a particular busi-

ness which would bring about actual or potential competition with the business of national banks, and at the same time deny the power of Congress to meet such created condition by legislation appropriate to avoid the injury which otherwise would be suffered by the national agency."

It has been held that "a question arising in regard to a statute of the United States concerning patents for inventions cannot be regarded as judicially settled when it has not been so settled by the highest judicial authority which can pass upon the question."

Andrews v. *Hovey*, 124 U. S. 694, 716.

The same must necessarily be true of any and all statutes of the United States.

In *The J. E. Rumbell*, 148 U. S. 1, 17, Mr. Justice Gray speaking for the court says:

> "But the question in controversy depends upon principles of general jurisprudence, and upon the true construction of an act of congress, and arises in the courts of the United States exercising the admiralty and maritime jurisdiction exclusively vested in them by the constitution. Upon such a question, neither the decisions of the highest court of a state, nor those of the circuit and district courts of the United States, can relieve this court from the duty of exercising its own judgment."

In *Scott* v. *McNeal*, 154 U. S. 34, 45, the Court, again by Mr. Justice Gray, holds:

> "Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the constitution of the United States, this court is no more

bound by that court's construction of a statute of the territory or of the state, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another state. In every such case, this court must decide for itself the true construction of the statute."

2. Even aside from the provisions of the amendment of September 26, 1918, there is no law in Missouri inconsistent with the appointment of a national bank as executor. Section 11, Article I, Chapter I, Revised Statutes, Missouri, 1919, reads as follows:

> "After probate of any will, letters testamentary shall be granted to the persons therein appointed executors. If a part of the persons thus appointed refuse to act or be disqualified, the letters shall be granted to the other persons appointed therein. If all such persons refuse to act, or be disqualified, letters of administration shall be granted to the person to whom administration would have been granted if there had been no will: Unless it shall be shown to the satisfaction of the court, or the judge in vacation, that the person or persons so named are incompetent, unsuitable or improper persons to execute said will, in which case some other person than the executor named may be appointed."

The terms of this statute are mandatory and the person named must be appointed unless such person refuses to act or is disqualified, or is incompetent, unsuitable or improper. The relator has not refused to act, it is not incompetent, unsuitable or improper. The order of the

Probate Court is expressly based upon the relator's disqualification, and inasmuch as relator's power or capacity to act cannot be gainsaid in view of the grant from Congress, this alleged disqualification must be deduced from the contention that no corporation except a trust company organized under Missouri laws may be appointed executor. This position is quite untenable.

The statute last above cited requires the appointment as executors of the "persons" named in the will. Section 7055, Article II, Chapter 57, Revised Statutes, Missouri, 1919, defines the word "person" as used in the statutes of the state as follows:

> "When any subject-matter, party or person is described or referred to by words importing the singular number or the masculine gender, several matters and persons, and females as well as males, and bodies corporate as well as individuals, shall be deemed to be included."

It has been consistently held that the word "person" includes a corporation.

> *Farmers & Traders Bank* v. *Harrison*, 57 Mo., 503, 513;
> *Shockley* v. *Fisher*, 75 Mo., 498, 501.

It would follow from this that any corporation, having the power under its charter to act as executor, might under the laws of Missouri be named as executor in a will and would in such case be entitled to letters testamentary. It is true that the only express statutory authority for the creation in Missouri of corporations having this charter power is contained in Article III of Chapter 108, Revised

Statutes, Missouri, 1919, providing for the incorporation of trust companies.

But it by no means follows that, because no other Missouri corporation than a trust company is expressly given the capacity to act as executor, another corporation having that capacity is disqualified to act because it is not a trust company. There will be found nothing in the statutes directly or indirectly forbidding the appointment of a properly qualified corporation as executor.

It is true that certain sections of the Missouri statutes regulate the exercise of trust powers by trust companies. Section 11801, Revised Statutes, 1919, authorizes the appointment of trust companies as executors.

Sections 11802 and 11803 of said Article III give permissive authority to set apart a trust guaranty fund. Section 11838 provides a method for trust companies to avoid the giving of bonds, but is not mandatory. It is in no sense a condition or restriction upon the right or power to act, if a bond be given. Sections 6222, 6225, 6226, 6341, 6342, 6344, 6345 and 6346, referred to in Section 11838, and being part of the state insurance law, apply, by virtue of the language of the section itself, only to companies doing business without bond. The provision is that these sections "shall apply to all companies doing business under this section."

Moreover these insurance sections are administrative only and can be complied with by national banks. They are substantially identical with the regulations of the Federal Reserve Board governing the exercise of trust powers by national banks. As held in *Re Turner's Estate, infra*, the state law must yield in such matters to the federal law.

3. However that may be, the question is foreclosed in Missouri by the amendment to the Federal Reserve Act, enacted September 26, 1918. That amendment provides in this connection as follows:

> "Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this Act."

It has been suggested that this is only a congressional definition of what was meant in the original act by "in contravention of state or local law." We are willing to accept the suggestion for the purpose of the argument. In the light of the authorities cited under Points I, II and III, it is beyond doubt that Congress need not have included this qualification at all. It would have been perfectly proper for Congress to grant trust powers to national banks, even if the exercise of such powers were in contravention of state law. The action of Congress would in such case absolutely supersede the inconsistent state statute.

If, then, Congress could omit the qualification altogether, it can give to the words used any interpretation it sees fit. It might provide directly that the trust powers should be granted to national banks in any state where such powers were authorized to be exercised under state laws by state banks, trust companies or other corporation which compete with national banks. Or it might reach the same result, as it did in fact, by providing for the grant of the powers in cases where not in contravention of state law.

and then providing that "in contravention of state law" should not include any body of statutes under which state banks or trust companies exercise similar powers.

The Federal Reserve Act, as amended, has been so interpreted and enforced in many states.

The Supreme Court of New York, in a case involving the appointment of a national bank as guardian, sustained the appointment in the face of a state statute forbidding any corporation other than a New York trust company to exercise trust powers.

In *Re Mollineaux,* 179 N. Y. Supp. 90, the Court said (p. 91):

> "Hence we see that Congress by appropriate legislation has vested National Banks with power to act in enumerated trust capacities and under the cited decision of the United States Supreme Court such legislation became the controlling and paramount law superior to any inconsistent State legislation. In my judgment, the state no longer has power to prohibit the exercise within its domain of the powers and functions so conferred upon such Banks and no power to accomplish this result indirectly by discrimination in favor of local corporations and against national banks or agencies of a similar character."

In *Stanchfield's Estate,* 171 Wis., 553, 178 N. W. 310, the Supreme Court of Wisconsin holds that a state statute forbidding the appointment of any corporation not organized under the laws of the state as administrator or trustee, is ineffective after the passage of the Federal Reserve Act and that the appointment should be made.

In *Hamilton* v. *State*, 94 Conn. 648, 110 Atl. 54, the court passes upon the petition of a national bank to be appointed guardian, in this language (p. 651):

> "The right of the State to withhold from a National Bank within its borders the enjoyment of any powers conferred by Congress which are co-extensive with those given to State corporations exercising the same or similar functions in their chartered activities is expressly denied. It can make no essential difference then whether this state discrimination takes the form of an express statutory prohibition or is to be implied from the mere absence of permissive legislation; the test to be applied is the same in both cases. If State Banks or Trust Companies are accorded powers in the conduct of their business that may appropriately be exercised in connection with the primary purposes of that business, neither State legislation forbidding the exercise of such powers by a National Bank nor the absence of legislation expressly sanctioning its exercise of them can affect the right of Congress to confer the same powers upon National Banks in the same territory or impair the Banks' rights to exercise them when so bestowed."

The Supreme Court of Pennsylvania has also passed upon the question and sustained the plain intent of the Federal Reserve Act. *In re Turner's Estate*, 277 Pa. St. 110, 120 Atl. 701, that court says:

> "The answer to this contention is that, in so far as the state law is inconsistent with the federal Act, the former must yield to the latter, even though the result may be to place upon federal banks a benefit or burden not received or assumed by the state banks and trust companies.
>
> The definition given in the federal act as to what constitutes a violation of the state law takes no cognizance of the fact that certain administrative details

in the regulations of federal banks were different from those governing state institutions. The existence of these differences, however, is not sufficient to deprive a national bank of the enjoyment of its power under the federal law."

The case of *Fidelity National Bank and Trust Company* v. *Enright*, 264 Fed. 236, though not involving the same question, unqualifiedly sustains the power of national banks to exercise trust functions in Missouri. The doctrine there announced is decisive of the present case.

The decision of the Supreme Court of Michigan in the case of *First National Bank* v. *Fellows*, subsequently appealed to the United States Supreme Court, is also to the effect that the grant of trust powers is not in contravention of the laws of Michigan, and is therefore another authority in our favor.

Fellows ex rel. v. *First National Bank*, 192 Mich. 640, 159 N. W. 335.

4. As a matter of fact, however, the amendment of 1918 is more than a mere definition of terms. In effect it is a legislative declaration and clarification of the law as laid down in the original enactment. The Supreme Court in *First National Bank* v. *Fellows, supra*, though reciting that the Michigan Court had already held the grant of trust powers not to be in contravention of state law, very clearly and forcibly expressed the opinion that no other result could have been reached. This appears not only from the quotation already made from the opinion in that case, but still more plainly from the following:

"Of course, as the general subject of regulating the character of business just referred to is peculiarly within state administrative control, state regulations for the conduct of such business, if not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came, in virtue of authority conferred upon them by Congress, to exert such particular powers. And these considerations clearly were in the legislative mind when it enacted the statute in question. This result would seem to be plain when it is observed (a) that the statute authorizes the exertion of the particular functions by national banks when not in contravention of the state law; that is, where the right to perform them is expressly given by the state law; or, what is equivalent, *is deducible from the state law because that law has given the functions to state banks or corporations whose business in a greater or less degree rivals that of national banks, thus engendering from the state law itself an implication of authority in Congress to do as to national banks that which the state law has done as to other corporations;* and (b) that the statute subjects the right to exert the particular functions which it confers on national banks to the administrative authority of the Reserve Board, giving besides to that board power to adopt rules regulating the exercise of the functions conferred, thus affording the means of co-ordinating the functions when permitted to be discharged by national banks with the reasonable and nondiscriminating provisions of state law regulating their exercise as to state corporations,—the whole to the end that harmony and the concordant exercise of the national and state power might result." (Italics ours.)

5. Under the provisions of Section 11 (k) therefore, as now amended and in force, the question for determination is

reduced to this: Do the laws of Missouri authorize or permit the exercise of trust powers, including the power to act as executor, by state banks, trust companies or other corporations which compete with national banks? This question is answered in the affirmative by the statutes of the state.

Chap. 108, Art. 3, Section 11799, Pars. 1, 3, 4 & 9.

The opinion of the Missouri Supreme Court admits and asserts that trust companies have such powers.

That concludes the matter, even if the words "which compete with national banks" be held to modify the words "state banks" and "trust companies", as well as "other corporations." The result is not changed by such a construction. No contention can be made that trust companies in Missouri do not compete with national banks in every function of the banking business. That is the statutory provision and the judicial decision.

Prior to 1915, trust companies in Missouri were granted, among other powers, the following:

> "First, to receive money in trust, and to accumulate the same at such rate of interest as may be obtained or agreed upon, or to allow such interest thereon, as may be agreed, not exceeding in either case the legal rate."
> Rev. St. Mo. 1909, Sec. 1124.

The question of the extent and nature of the business engaged in by trust companies under this section, was before the Supreme Court in *Denny* v. *Jefferson County*, 272

Mo. 436. After considering the previous decisions, the court says, (p. 447):

> "Their powers cover practically the whole field of legitimate banking, with the exception of receiving money on deposit without the payment of interest."

The court quotes with approval the language of Bond, J., in *Muth* v. *St. Louis Trust Co.*, 88 Mo. App., 596, 602:

> "There seems to be no legal obstacle to the exercise by trust companies of all the functions of ordinary banks as to receiving and paying out deposits of money, provided a rate of interest, however small, is allowed upon the sums so received."

These opinions relate to the section as it existed prior to 1915. In that year, the section was amended so as to read as follows:

> "To receive money in trust and to accumulate the same, at such rate of interest as may be obtained or agreed upon, or to allow such interest thereon as may be prescribed or agreed, and to receive money on deposit, with or without allowing interest thereon, not exceeding in any case the legal rate: Provided, however, that no trust company shall maintain in this state a branch trust company or receive deposits or pay checks except in its own banking house."

This amendment expressly removes the only limitation on the banking powers of trust companies, and since its enactment "the whole field of legitimate banking" is open to and occupied by trust companies. As to the fact of competition, the petition for mandamus alleges and the demurrer admits that the trust companies are competing with the petitioner.

The suggestion of the Missouri Supreme Court that while trust companies may compete with national banks in the field of commercial banking, yet they do not compete in the exercise of trust functions, is so forced as hardly to require serious comment. The very purpose of the act of congress is to enable national banks to compete in all fields with trust companies so as to place their commercial competition on an equal basis. The Missouri Supreme Court says: "We deny to national banks the right to exercise trust powers, as trust companies are authorized to exercise them: therefore, national banks do not compete with trust companies in such exercise." Yet the commercial competition has been so keen that Congress felt called upon to legislate upon the subject, and this court in *First National Bank* v. *Fellows,* upheld the legislation.

V.

There are three cases in the books which might be cited as opposed to the conclusion reached above.

1. In *People* v. *Brady,* 271 Ill., 100, 110 N. E., 864, the Supreme Court of Illinois held that Section 11 (k) of the Federal Reserve Act did not authorize the relator, First National Bank of Joliet, to exercise trust powers, because such exercise would be in contravention of state law. Shortly thereafter, the opinion of the United States Supreme Court was handed down in *First National Bank* v. *Fellows, supra.* Thereupon, the First National Bank of Joliet sought again to compel the issuance of a certificate by the state authorities.

The Supreme Court of Illinois held that the proceed-

ing was *res adjudicata* so long as the decision in *People* v. *Brady,* remained in force, and that relief could not be had for that reason. But the court says: "Under the decisions of the Supreme Court of the United States, our judgment was erroneous."

People v. *Russell,* 283 Ill., 520, 119 N. E., 617.

2. The *Appeal of Woodbury,* 78 N. H. 50, 96 Atl. 299, involved the right of a national bank to be appointed administrator in New Hampshire. There was a state law as follows:

> "No trust company, loan and trust company, loan and banking company or similar corporation shall hereafter be appointed as administrator." * * *

The court held that a national bank could not be appointed. This is a proper application of the phrase, "in contravention of state or local law." Here the state law prohibits the appointment of any corporation whatsoever, and is an example of just the kind of state enactments that the language quoted is intended to cover. The decision is clearly right under the New Hampshire statute, but it has no bearing on the case at bar.

3. The case of *Aquidneck National Bank* v. *Jennings,* 117 Atl. 743, (R. I.) also involved the effect of Section 11 (k). That was a mandamus proceeding brought against the Treasurer of Rhode Island, to compel him to accept a deposit of securities provided by the state law to be made by trust companies. The Supreme Court of Rhode Island decided that, under the peculiar trust laws of that state, the exercise of trust powers by national banks would be in con-

travention of its laws and further that no law, state or national, required the State Treasurer to accept deposits from any but trust companies.

As to the first ground of decision, it is based on the peculiarities of Rhode Island law, is out of line with all the other authorities, and has no application here. As to the second ground, it is entirely beside the point involved in the pending case, as we are not concerned with any question of the deposit of securities. The Missouri law does not require any deposit of securities unless it is desired to act without bond.

In this connection, it may be apposite to refer to the ruling of the Attorney General of Missouri when this question was submitted to him by the Banking Department, under date of June 12, 1919. First remarking that his original opinion was to the effect that, because not brought under the authority of the State by the terms of the Federal Reserve Act, national banks in Missouri were not entitled to the exercise of trust powers, he proceeded to rule, after a full consideration of the Act of Congress and the authorities, that the Banking Department can and must receive the deposits of securities under Section 11838 tendered by National Banks. The argument of the Attorney General is so cogent that we append it hereto in full, as indicative of the practice of the administrative departments of the state in this connection.

VI.

CONCLUSION.

The effect of the decision of the Missouri Supreme Court is and will be to nullify in the State of Missouri, the

provisions of Section 11 (k), Federal Reserve Act. While not in express words holding said section invalid, the State court refuses to give it any force. If Congress was right, and we believe it was, in thinking that national banks must have fiduciary powers to enable them to compete successfully with trust companies, then the national banking system must fall if the decision stands. The decision in *First National Bank* v. *Fellows*, means nothing, if the legislatures and courts of the state may prevent the enforcement of the Act by the mere device of holding its terms to be in contravention of state law. It is not conceivable that such a result should be permitted.

Respectfully submitted,

JOHN C. LANDIS, JR.,
JUSTIN D. BOWERSOCK,
WILLIAM T. JONES,
Attorneys for Plaintiff in Error.

HENRY L. MCCUNE,
ARMWELL L. COOPER,
I. P. RYLAND,
SAMUEL MCREYNOLDS,
of Counsel.

APPENDIX.

Jefferson City, Mo., June 12, 1919.

Honorable C. F. Enright,
State Bank Commissioner,
Jefferson City, Mo.
Dear Sir:—

You request the opinion of this department on the following proposition:

> "One of the national banks that have assumed fiduciary powers desires to deposit $200,000.00 with me as Bank Commissioner and receive a certificate from me to that effect, presuming that in so doing they may qualify as guardian, curator, executor, administrator, etc., without giving bond as such.
>
> Q. Does any authority exist requiring me to accept such a deposit and issue the certificate? Such privileges are given in Section 166 but seem limited to companies incorporated under Article 111, Banking Laws, 1915; in other words, trust companies."

As the exact question you present has not been passed upon by any federal court or the court of last resort in this State, we can render an intelligible opinion and arrive at conclusions which may be maintained only by reviewing, in more or less detail, the Act of Congress and amendments thereto under which national banks derive their authority to exercise the powers and functions of trust companies and the decisions of the United States Supreme Court passing upon the authority of Congress to legislate upon the subject.

The Federal Reserve Act, Approved December 23, 1913, 38 Statutes at Large, 261, in Section 11 thereof, contains the following paragraph:

> "(k) To grant by special permit to national banks applying therefor, when not in contravention of State or Local law, the right to act as trustee, executor,

administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe."

This section was subsequently amended in 1916 and again in 1918, concerning which said amendment we shall have more to say hereafter.

Said paragraph (k) of said Section 11 came before the United States Supreme Court in the case of *First National Bank* v. *Fellows, Attorney General of the State of Michigan ex rel. Union Trust Company et al.* This suit was a proceeding in the nature of *quo warranto*, brought by the Attorney General at the relation of certain trust companies, to test the right of a national bank to exercise the powers and functions of a trust company by virtue of the authority conferred upon it under paragraph (k) of Section 11 of the Federal Reserve Act of 1913. As it was conceded by the complainant in this case that the exercise of said powers by said bank was not in contravention of the laws of the State of Michigan, there was presented to the court the question of the power of Congress to confer the powers and functions called in question.

The Supreme Court of the State of Michigan, on the theory that there was no apparent, natural connection between the business of banking and federal fiscal operations and the business of acting in fiduciary capacities, held that the State not only controlled the devolution of estates of deceased persons and the conduct of private business within the State, but also the creation of corporations and the qualifications and duties of such as may engage in the business of acting as trustees, executors, and administrators; and that the Act of Congress amounted to an invasion of the State's rights.

On appeal, the Supreme Court of the United State, in an opinion by White, C. J., reported in 244 U. S., 416, held the decision of the state court in direct conflict with the rule laid down in the cases of *McCullough* v. *Maryland* and *Osborn* v. *Bank*, previously decided by said court. The court summarized these earlier cases as establishing the rule that although a business is of a private nature and

subject to state regulations, if it is of such a character as to cause it to be incidental to the successful discharge by a bank chartered by Congress of its public functions, it is competent for Congress to give the bank the power to exercise such private business; that this rule excludes the power of the State in such case, although it may possess in a general sense authority to regulate such business, to use that authority to prohibit such business from being united by Congress with the banking function, since to do so would be but the exertion of such state authority to prohibit Congress from exerting a power which under the Constitution it has a right to exercise.

Upon the premises thus laid down, the court continues with its opinion as follows:

(Here follows the excerpt from said opinion herewith before set forth.)

We call your attention to the language of the opinion following "(a)," quoted above, wherein the court holds that the powers conferred by Congress are not in contravention of the state law, for the reason that the right to perform such powers is expressly given by said law to state banks or other corporations, whose business in some degree comes in competition with that of national banks, and that Congress, therefore, has implied authority to extend to national banks the same powers and functions that have been conferred by the State upon said institutions.

We further call your attention to "(b)" appearing in above quotation, wherein the court comments on the authority of the Reserve Board to regulate the exercise of the functions conferred to the end that same may be carried out in harmony with state regulations.

The amendment of 1916, 39 Statutes at Large, 752, affected only paragraph (m) of said Section 11, and has no bearing on the question here under consideration.

Before carefully considering the force and effect of the provisions of the Act of 1918, amending said paragraph (k), in the light of the opinion of the United States Supreme Court in the aforesaid Michigan case, we were inclined to the opinion that, conceding the right of Congress to confer upon national banks the powers of trust companies, such

institutions were not brought under the authority of the State nor subjected to the regulation of the State Banking Department, whereby the interests of the people of the State are sought to be protected, and were not, therefore, entitled to the privileges extended to companies created under state laws and subject to its supervision. After further investigation and careful consideration, however, we are constrained to believe that the power of Congress, as declared by the United States Supreme Court on the principal proposition that is, on its power to confer upon national banks the authority of acting in fiduciary capacities and the basis upon which such power is placed by the Supreme Court, would unquestionably be extended by said court to the conferring of the functions, rights and privileges incident thereto, including such as are covered by the Act of 1918.

With the evident intention of extending and further securing the powers conferred by said paragraph (k), Congress, in an Act, Approved September 26, 1918, 39 Statutes at Large, 752, amended said paragraph to read as follows:

(Here follows the text of the amendment in full.)

In the second paragraph of the amendment of 1918 it is provided that the exercise of the powers conferred by national banks "shall not be deemed to be in contravention of state or local law within the meaning of this act." Thus is excluded the right to interpose as a defense the objection that the exercise of such powers comes within the limitation contained in this act, to-wit: that they shall not be in contravention of state or local law.

The Act then proceeds, as can readily be seen to lay down rules and regulations whereby the exercise of such powers by national banks shall be conducted with a view to safeguarding those who may deal with them in their fiduciary capacity, all for the obvious purpose of bringing said institutions within the regulations set up by the laws of the State governing local corporations.

Said Act provides that the State Banking Department shall have the right to examine the books and assets of national banks pertaining to the trust business conducted by them, which business must be kept separate and apart from

the other transactions of the institution. It further grants to the owners of trust funds held by the bank a special lien on the bonds or other securities set apart in addition to their claim against the general assets of the bank. Thus an effort is made to properly safeguard the interests of those who deal with such a bank in its fiduciary operations.

You will note that said Act provides that where the State requires corporations acting in fiduciary capacities to deposit securities with state authorities before being allowed to act as fiduciaries without execution of the usual bond, national banks, which have obtained the necessary permit to assume trust relations, shall make a like deposit with the state authorities and shall be entitled to all of the privileges extended to state corporations under similar circumstances. If national banks are given the same powers to act in fiduciary capacities as are conferred on trust companies under the banking act of this State, then, by the terms of Section 166, they are entitled to avail themselves of its provisions. Thus we reach the specific question you present and lay the basis for our conclusions, *that as Bank Commissioner you are not only authorized to, but must accept the deposit tendered you by a national bank which has secured the permit of the Federal Reserve Board to act in fiduciary capacities,* which said deposit must equal in amount and be similar in character to that required of state institutions under Section 166, of an Act of the General Assembly of the State of Missouri, Approved March 25, 1915, relating to banks and trust companies.

Respectfully submitted,

(Signed) S. E. SKELLEY,
Assistant Attorney-General.

SES. RB

Office Supreme Co
FILED
MAR 26 1
WM. R. STAN
C

30,072

IN THE

Supreme Court of United States

OCTOBER TERM, 1923.

THE STATE OF MISSOURI, AT THE RELATION OF THE BURNES NATIONAL BANK OF ST. JOSEPH, MISSOURI,
Plaintiff in Error,

v.

A. B. DUNCAN, JUDGE OF THE PROBATE COURT OF BUCHANAN COUNTY, MISSOURI,
Defendant in Error.

No. 762

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF OF DEFENDANT IN ERROR

MORTON JOURDAN,
CHAS. H. MAYER,
Attorneys for Defendant in Error.

30,072

IN THE

Supreme Court of United States

OCTOBER TERM, 1923.

THE STATE OF MISSOURI, AT THE RELATION OF THE BURNES NATIONAL BANK OF ST. JOSEPH, MISSOURI,
Plaintiff in Error,

v.

A. B. DUNCAN, JUDGE OF THE PROBATE COURT OF BUCHANAN COUNTY, MISSOURI,
Defendant in Error.

No. 762

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT

The plaintiff in error, Burnes National Bank, a national bank doing business at St. Joseph, Buchanan County, Missouri, filed its petition in the Supreme Court of Missouri, alleging that one Mary E. Bird, a resident of Buchanan County, died

in November, 1922, leaving a will which was duly admitted to probate in the Probate Court of Buchanan County, and that by the terms of the will the testator had named said Burnes National Bank as executor; that subsequent to the probate of said will, said Burnes National Bank applied to the Probate Court of Buchanan County for appointment as executor and for the issuance of letters testamentary under the terms of the will; that thereafter A. B. Duncan, Judge of said Probate Court, the defendant in error here, entered an order declining to appoint said Burnes National Bank as executor, on the ground that under the laws of the State of Missouri said national bank was not authorized to act as executor, and that said A. B. Duncan, Probate Judge, had appointed one Mary E. Williams to be the administratrix with the will annexed of said estate.

The petition further set out that part of the Federal Reserve Act (U. S. Compiled Statutes, Ann. Sup. 1919, Sec. 9794K) authorizing the Federal Reserve Board, under certain conditions, to grant national banks the right to act as executors, and that the Federal Reserve Board had granted said Burnes National Bank the right to so act.

The petition thereupon prayed the Supreme Court of Missouri to issue an alternative writ of mandamus, directing said A. B. Duncan, Judge of the Probate Court, to set aside said order appointing Mary A. Williams, and directing said

Probate Judge to appoint the petitioner as executor of said estate, or to show cause why he had not done so.

The Supreme Court of Missouri caused an alternative writ of mandamus to be issued. A. B. Duncan, Probate Judge, defendant in error here, for return to the alternative writ, demurred on the ground that the aforesaid facts, as stated in the petition, were insufficient to authorize the issuance of a peremptory writ of mandamus.

Thereafter the Supreme Court of Missouri denied the peremptory writ, and the case was brought to this court by the said Burnes National Bank on writ of error to the Supreme Court of Missouri.

BRIEF

I.

That an Act of Congress, within the field covered by its constitutional power, is the supreme law of the land; that Congress has complete constitutional power to establish and regulate national banks, and that the Act of Congress granting trust powers to national banks is constitutional and cannot be nullified or controlled by the states, are three propositions contended for by the plaintiff in error, which are conceded by the defendant in error.

II.

The contention of the defendant in error is that the Missouri Supreme Court committed no error in holding that the exercise of the office of executor, here sought to be exercised, would be in contravention of the state law.

The power to regulate descents and distributions and the devolution of estates is exclusively within the state.

Overly v. Gordon, 177 U. S. 214;
Pennoyer v. Neff, 95 U. S. 714.

Executors and administrators are instruments through which the states regulate and control de-

scents, distributions and the devolution of estates, and therefore, it seems to us, the state must have the right to determine what instruments may be used, without contravening the state law. This was expressly held in the case of *First National Bank v. Fellows*, 244 U. S. 416, l. c. 427-8, in which case Chief Justice White said:

"In other words, we are of opinion that as the particular functions in question by the express terms of the Act of Congress were given only, 'when not in contravention of the state or local law,' the state court was, if not expressly, at least impliedly, authorized by Congress to consider and pass upon the question whether the power was or was not in contravention of the state law, and we place our conclusion on that ground. * * * The nature of the subject dealt with adds cogency to this view since that subject involves the action of state courts of probate in a universal sense, implying from its very nature the duty of such courts to pass upon the question and the power of the court below within the limits of state jurisdiction to settle, so far as the state was concerned, the question for all such courts by one suit, thus avoiding the confusion which might arise in the entire system of state probate proceedings and the very serious injury to many classes of society which also might be occasioned."

The amendment to Section 11 (k) of the Federal Reserve Act was not intended to and did not deprive the states of this right. The original Federal Reserve Act authorized the Federal Reserve Board

"To grant by special permit to national banks applying therefor, when not in contravention of state or local laws, the right to act as trustee,

executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe."

As amended in September, 1918, Section 11 (k) is as follows:

"To grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which state banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the state in which the national bank is located.

"Whenever the laws of such state authorize or permit the exercise of any or all of the foregoing powers by state banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of state or local law within the meaning of this Act."

It will be noted, of course, that the section, before amendment and after amendment, conferred no direct authority upon national banks. The original section authorized the Federal Reserve Board to grant to national banks the right, by special permit, when not in contravention of state or local law, to act as executors. As amended, the first paragraph above quoted authorized the Federal Reserve Board to grant to national banks the right, by special permit, to act as executors or in other fiduciary capacity (1) when

not in contravention of state or local law and (2) when located in states which authorized banks, trust companies or other corporations coming in competition with national banks to so act.

It is contended by the plaintiff in error that the Congress having thus authorized the Federal Reserve Board to grant the right to national banks, upon the two above conditions, the Congress, by the last above quoted paragraph of the amendment, rendered entirely meaningless and useless the phrase "when not in contravention of state or local law."

Baldly stated, such is the contention of the plaintiff in error, because, under the first paragraph of the amendment, the Federal Reserve Board was not authorized to give national banks the right to act as executors, except in those states where state banks, trust companies or other corporations coming in competition with national banks were permitted to act under the laws of the state, nor, under the first paragraph of the amendment, was the Federal Reserve Board authorized to give national banks the right to act as executors except when not in contravention of state or local law. We submit that these two exceptions were not one exception, and that each exception was intended to have and does have some meaning.

The contention of the plaintiff in error is that in any state where banks or trust companies

are authorized to act as executors, national banks may act as executors, regardless of whether or not such action by national banks is in contravention of state law.

If, regardless of any state law, national banks, under the amended Act, must be permitted to exercise the powers of executors in those states where trust companies competing in some particulars with national banks are permitted to act, then it is impossible to conceive of any purpose whatever for the use of the clause "when not in contravention of state law." The clause was in the original Act, and, in retaining it in the amended Act, the Congress must have intended it to have some meaning.

Inasmuch as the Act, before and after amendment, conferred no power directly upon national banks, but conferred a mere administrative power upon the Federal Reserve Board, it would seem that the second paragraph of the amendment was intended as an interpretation of the Act for the benefit of the Federal Reserve Board, and was not intended to render meaningless and to destroy one of the principal provisions of the original Act, which provision was retained in the Act as amended.

Unless the clause "when not in contravention of state law" is to be held to be meaningless, then the Missouri Supreme Court had the duty and the right of determining whether or not the appoint-

ment of a national bank as executor in Missouri was in contravention of state law; and, therefore, the court committed no error in declining to issue its writ of mandamus to compel the defendant in error herein to appoint the plaintiff in error herein as an executor in Missouri.

First National Bank v. Fellows, 244 U. S. 416;

People v. Brady, 271 Ill. 100;

Appeal of Woodbury, 78 N. H. 50;

First National Bank v. Missouri, U. S. Supreme Court Advance opinions of Feb. 15, 1924, No. 8, p. 235;

Aquidneck National Bank v. Jennings, 117 Atl. (R. I.) 743.

For the convenience of the court, we print the opinion of the Missouri Supreme Court rendered in this case as an appendix to this brief.

Respectfully submitted,

MORTON JOURDAN,

CHAS. H. MAYER,

Attorneys for Defendant in Error.

APPENDIX

IN THE

Supreme Court of Missouri

EN BANC.

OCTOBER TERM, 1923.

THE STATE OF MISSOURI, AT THE RELATION OF THE BURNES NATIONAL BANK OF ST. JOSEPH, MISSOURI,
~~*Plaintiff in Error,*~~

v.

A. B. DUNCAN, JUDGE OF THE PROBATE COURT OF BUCHANAN COUNTY, MISSOURI,
~~*Defendant in Error.*~~

~~No. 762~~

MANDAMUS

Opinion filed January 4, 1924.

The Relator filed its petition in this court setting forth its organization as a national bank and alleging that one Mary E. Bird, a citizen of the

State of Missouri and resident of the city of St. Joseph, died November 27, 1922, leaving a will which was duly admitted to probate in the Probate Court of Buchanan County, in which will she named the relator as executor; that the Federal Reserve Act, Section 9704, paragraph K, in granting certain powers to national banks, included the right to act as executors of estates; that the Federal Reserve Board, under the rules and regulations prescribed by the Federal Reserve Act, granted the petitioner the right to exercise its privileges so granted in so far as such exercise of that right was not in contravention of the state or local law; that under the Revised Statutes of Missouri for 1919, trust companies of this state are authorized to act as executors, and in fiduciary capacities; that subsequent to the probate of said will the petitioner made application to the Probate Court of Buchanan County for the appointment as executor, and for the issuance of letters testamentary under the terms of the will; that January 29, 1923, the respondent, judge of said probate court, entered an order declining to appoint the petitioner on the grounds that under the laws of the State of Missouri, said petitioner was not authorized to act as executor. The proceedings of the probate court in that connection were set out in full, including the order declining to appoint the Burnes National Bank as executor, and the appointment of Mary E. Williams, to be administratrix, with will annexed, of said estate. The pe-

tition thereupon prays this court for an alternative writ of mandamus, directing the respondent judge of the probate court to set aside said order appointing Mary E. Williams, and to appoint the petitioner as executor of said estate, or show cause why he had not done so.

Upon the filing of such petition this court caused an alternative writ to be issued March 3, 1923.

The respondent then for return to the alternative writ demurred on the ground that the aforesaid petition did not state facts which would authorize the issuance of a peremptory writ of mandamus. The case, then, is to be determined upon the facts stated in the petition for an alternative writ.

I.

The petitioner calls attention to Section 11, R. S. Mo. 1919, providing that after the probate of a will, letters testamentary shall be granted to the persons therein appointed executors, arguing that "persons" mentioned in the section includes corporations as well as natural persons. There can be no force in this argument unless petitioner means that this and other sections of the chapter relating to administration, authorize any and every corporation to act as executor or in other fiduciary relation as provided for in that chapter. It is true that in many instances where the word "person" is used in a statute, it is construed to in-

clude corporations. The use of the term applies particularly to criminal statutes where a criminal act affects the property of a person. But that construction is by no means universal; it depends upon the context and the intent with which the term is employed. (30 Cyc. p. 1526; see Words & Phrases, title "Person.") The entire purpose and context of Article 1 on Administration excludes the idea that "person" means corporation. Section 7, relating to persons who may administer on estates; Section 6, excluding certain persons from acting as administrator or executor; Section 36, providing the form of letters issued to an executor; in fact, all the provisions of that article show that the Legislature was dealing with and granting powers to natural persons.

It must be remembered that there was no common law right to make a will or appoint an executor. It is purely a matter of statutory regulation. The statute authorizing certain persons to act as executor is an enabling statute, and it must be construed according to the intent and purpose of the Legislature in enacting it. The intent of the Legislature to include only natural persons in the authority granted in that article appears not only in the terms of the article, but is shown by the actual grant, in another statute, of authority to trust companies to act as executors, and in other fiduciary relations. There would have been no need of such affirmative act if this chapter on Administration had granted such au-

thority to all corporations. Before any corporation in this state can have a right to act in a fiduciary relation in administering estates there must be express authority given that kind of a corporation and that statutory authority must be construed in *pari materia* with the chapter relating to Administration. Certainly there is no warrant for a contention that any corporation which might be named as executor in the will would have authority to act as such unless the law creating and defining the powers of such corporation should authorize it to perform such duties. The petitioner cannot derive authority to act as executor from the article on Administration or the section of that article relating to executors. It must be authorized to act through some other statute, Federal or state, giving it such authority.

II.

The petitioner claims authority to act as executor under the provisions of the Federal Reserve Act. A brief filed herein by several *amici curiae*, presumably representing national banks, has a good deal to say about the authority of the Federal government quoting precedents to the effect that the Constitution of the United States and the Acts of Congress, within the scope of authority delegated to them, are paramount—the supreme law of the land—and binding upon all the states; that when Congress has enacted a statute within its constitutional power, regulating and defining

the powers of any agency created by Congress—a state cannot by any enactment nullify or abridge the powers thus granted or defined. Of course, those principles are well established, and the extent of such authority is not in issue in this case.

In accordance with its constitutional authority, Congress, it was held, had power to authorize the organization of national banks and invest them with whatever functions it thought necessary to make the business of the banks successful. Thus incidental authority was founded upon necessity; national banks could be empowered to perform any duties when "Congress was of the opinion that these faculties were necessary to enable the bank to perform the services which are exacted from it, and for which it was created." (*First National Bank v. Fellows*, 244 U. S. l. c. 420.) That quotation is taken from an earlier case and the principle applied to the section of the Federal Reserve Act authorizing banks to act in fiduciary capacities. That case is the only case cited, and, so far as we know, the only case decided by the United States Supreme Court construing that feature of the Federal Reserve Act under which the petitioner asserts its right. It is mentioned often in later decisions of other courts, and the argument of petitioner is largely based upon deductions drawn from it by such other courts. We think it settles a good many questions which have arisen in relation to the Act—questions which occur in this case. It is well to note what is said there re-

garding the authority granted by Congress to a national bank to serve in fiduciary relations, such as executor, as necessary to enable the bank to perform the services required of it. We will notice below just what is meant by those duties in the light of the provision of the Federal Reserve Act.

III.

While Congress has power, unless restrained by the Federal Constitution, to absorb to itself the entire regulation of such matters as are under consideration here, it has not done so. On the contrary, while the Federal Reserve Act authorizes National Banks to act in the capacity of executors, administrators, etc., Congress appeared to have in mind the popular protest against its supposed tendency to legislate in matters of purely local and state concern, for it limited the authority of national banks in that respect to cases where such authority was "not in contravention of the state or local law." The question at issue here is whether the exercise of the fiduciary function by National Banks authorized by that provision of the Federal Reserve Act is in contravention of the law of the State of Missouri. First, however, we must ascertain what authority is to decide that question. Is its determination peculiarly within the jurisdiction of the Federal Court? Or does this court have authority to say whether the exercise of such functions by National Banks is in contravention of the law of this state?

It has always been held that the power to regulate the acquisition and transfer of property, descents and distributions, the devolution of estates, etc., is exclusively within the jurisdiction of the state. *Overly v. Gordon,* 177 U. S. 214; *Pennoyer v. Neff,* 95 U. S. 714. Trustees, executors and administrators are the instruments through which the state regulates and controls certain classes of property. This is recognized by the Federal courts in the cases just mentioned. It naturally follows that the state, by statute, has the right to say, and the state courts have the right finally to determine, what agencies may exercise such control without acting in contravention of the state law. That was expressly held by the Federal Supreme Court in the Fellows case. (244 U. S., l. c. 427-8), where Chief Justice White said:

"In other words, we are of opinion that as the particular functions in question by the express terms of the Act of Congress were given only, 'when not in contravention of the state or local law,' the state court was, if not expressly, at least impliedly, authorized by Congress to consider and pass upon the question whether the power was or was not in contravention of the state law, and we place our conclusion on that ground. * * * The nature of the subject dealt with adds cogency to this view since that subject involves the action of state courts of probate in a universal sense, implying from its very nature the duty of such courts to pass upon the question and the power of the court below within the limits of state jurisdiction to settle, so far as the state was concerned, the question for all such courts by one suit, thus avoiding the confusion which might arise in the

entire system of state probate proceedings and the very serious injury to many classes of society which also might be occasioned."

Since that decision the Federal Reserve Act has been amended. Originally it authorized the Federal Reserve Board:

"To grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe."

Section 11 (k) of the Act was amended by Congress in September, 1918, so that the provision read as follows:

"To grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which state banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the state in which the national bank is located.

"Whenever the laws of such state authorize or permit the exercise of any or all of the foregoing powers by state banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of state or local law within the meaning of this Act."

It cannot be contended that Congress by this amendment took away from the courts of a state

the right to interpret its own statutes and to determine this particular question. The reason of the Supreme Court in the Fellows case negatives the existence of any such authority on the part of Congress.

The petitioner argues that this amendment enlarges the authority of national banks, giving them authority to act in such matters where before the amendment they had none. On the contrary, the first paragraph of the amendment limits the exercise of that authority. Under the original act the authority to act as executor, etc., given to national banks was only when such function was "not in contravention of the state or local law." Under the first paragraph of the amendment it is not sufficient that it is not in contravention of the state law, but there must be competition with state institutions, authorized to act in such fiduciary capacities, before a national bank has such authority.

The petitioner calls attention to the second paragraph of the amendment quoted as further limiting the right of the state to exclude national banks from acting in such capacities, by declaring that where the state gives such authority to state banks and trust companies or other corporations "which compete with national banks" the exercise of such power "shall not be deemed to be in contravention of the state or local laws." Some courts have held this to be a legislative interpreta-

tion of the authority granted and not binding upon the courts.

Appellant says that it was not necessary for Congress to make any qualification; that it had a right to authorize national banks to act in fiduciary relations without any exceptions and regardless of the state law. It is sufficient answer to say that Congress has not seen fit to do so. On the contrary, Congress has dealt very tenderly with the supposed sensitiveness of states in regard to encroachment upon their authority. It is not contended and cannot be that that provision attempts to take away from the state courts the right to determine when the exercise of such powers is in contravention of state law, except to define one particular instance where it shall not be so considered. It remains for the courts to say what is meant by the competition with national banks as mentioned in the Act. That the provision relating to the contravention of state or local law is retained in the amendment shows an intent to give it some meaning, and that meaning is not taken away by the attempted definition following. If the latter paragraph should be construed to state the entire case as to when national banks should be excluded from exercising such authorities, the use of the expression "not in contravention of the state or local law" would be superfluous.

We hold, therefore, that this court has the right and the duty to determine whether the office

which the petitioner seeks to discharge is in contravention of the laws of this state.

IV.

In consideration of the terms of paragraph 11 (k) of the Federal Reserve Act we must ascertain what Congress had in mind. Congress did not grant such powers to national banks because it claimed any right to provide for the custody of property which is within the constitutional control of the state. Congress had no intention to trespass upon state preserves. National banks were vested with such functions because they were necessary to enable them to "perform the services which were exacted from them and for which they were created." It was a matter of surviving against unequal competition. That idea is apparent in the Act, and particularly in the amendment. Unless it was necessary to the proper discharge of its duties there was no reason why a national bank should act in fiduciary relations, and such function would not be necessary unless the bank came in competition with the state institutions which would thereby have an advantage over their national competitors. This appears in the expressions where the Act speaks of other corporations, "which come in competition with national banks" * * * "which compete with national banks." If state institutions of like character are denied the right to exercise such functions national banks have no right to exercise them. It is in contravention of state law; that is, in contravention of the state legislative policy. It is only because na-

tional banks, by reason of an advantage given to state institutions, could not compete and survive that this authority is conferred upon them.

When Congress in the Act speaks of competition, of course it means competition on equal terms with state corporations. It cannot be that Congress intended national banks to have privileges and advantages which state institutions could not enjoy in matters relating to control of estates, which are peculiarly within the state authority. The entire purpose of the Act was not to give national banks an advantage but to place them upon equal terms with competitive state banks. It was said by the Federal Supreme Court in the Fellows case, l. c. 426:

"This must be since the state may not by legislation create a condition as to a particular business which would bring about actual or potential competition with the business of national banks and at the same time deny the power of Congress to meet such created condition by legislation appropriate to avoid the injury which otherwise would be suffered by the national agency. Of course, as the general subject of regulating the class of business just referred to is peculiarly within the state administration control, state regulation for the conduct of such business, if not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came in virtue of authority conferred upon them by Congress to exert such particular powers."

This is a distinct recognition of our interpretation of the Act. National banks have no right to

exercise the fiduciary functions enumerated in the statute unless the state has discriminated against national banks in that respect and put them at a disadvantage. If national banks, without such authority can compete successfully with state institutions, then under the terms of the Act they have no right to demand the exercise of such functions.

V.

In determining whether the exercise of fiduciary capacities by a national bank is in contravention of the state law it is not necessary to point to a specific statute which forbids the exercise of such functions by such banks or similar institutions of the state. If it is contrary to the policy of the state and plainly so appears from its statutory enactments, then it is in contravention of the state law. The legislative power of the state has not given authority to state banks to act as executors, administrators, etc., but has selected trust companies as the only and peculiar corporations to be invested with such trusts. This authority is not given to trust companies as a convenient incident to the conduct of their ordinary business. The legislature was not considering the prosperity of trust companies, but was looking for the safety of certain important trust funds which are attended with the natural insecurity and danger of dissipation, making them the especial and peculiar concern of the law. The legislative purpose was not to confer a privilege

upon trust companies but to seek additional sources of security for those funds. Hence the law-making body hedged about the custodians of such funds with restrictions, conditions and securities with which only a trust company could conveniently comply—restrictions which the state courts are powerless to impose upon national banks. National banks with the regulatory provisions in the Federal Reserve Act may be just as safe as the state trust companies. With that we have no concern. The propriety and expediency of statutes are for the sole determination of the legislative body. We must declare the legislative policy as we find it.

Now let us consider for a moment what that policy is:

(a) The legislature has not given authority to act as executors and administrators to state banks, the natural inevitable competitors of national banks in the transaction of ordinary business.

(b) In giving this authority to trust companies it has provided in Section 11801 R. S. 1919, Subdivision 5, that:

"All investments made by any trust company of money received by it in any fiduciary capacity shall be at its sole risk, and for all losses of such money the capital stock and property of the company shall be absoluely liable."

except on certain unimportant conditions.

(c) Subdivision 8 of the said last mentioned section provides that the property held by a trust

company in trust "shall not be mingled with the investments of the capital stock or other property belonging to such trust company or be liable for debts or obligations thereof." For the purposes of that section the trust company is required to have "a trust department in which all the business authorized by the Act" shall be kept distinct and separate from its general business.

(d) Subdivision 9, of the said section, provides that, unless otherwise provided in the instrument creating the trust, on certain of the money held by the trust company in a fiduciary capacity interest shall be allowed at not less than 2 per cent per annum, compounded annually.

(e) Section 11802 R. S. 1919, provides that the directors may set apart a trust or guaranty fund, and provides for its investment. Section 11803 provides that the guaranty fund shall be absolutely pledged for the faithful performance of the duties of the trust company under the provisions of the Act.

(f) Section 11838 R. S. 1919, provides that when any company now doing business in this state, or which may hereafter be organized under the provision of this article relating to trust companies,

"* * * which shall make with the bank commissioner a deposit of Two Hundred Thousand Dollars * * * shall be permitted to qualify as guardian and curator, executor, etc., without giving bond as such, and the fund so depos-

ited is primarily liable for the obligation of the company as guardian, curator, executor, etc."

The Federal Reserve Act provides that the assets held by a national bank in a fiduciary capacity shall be segregated from the general assets of the bank and a separate set of books and records shall be kept which shall be open to inspection of the state authorities. It further provides that notes deposited or held in trust by the company "awaiting investment" shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless first set aside in the trust department in United States bonds, etc., and in the event of the failure of such bank the owners of the funds held in trust for investment shall have a lien on the bonds. It further provides that when the laws of the state require corporations acting in fiduciary capacity to deposit securities with the state authorities, national banks shall be required to make similar deposits.

It cannot be contended that these regulations in any way conform to the requirements which the state law imposes upon trust companies. The extraordinary burden which trust companies carry by acting in a fiduciary relation is shown in Subdivision 5, in Section 11801, which makes all the capital stock and property of the company liable for the loss of trust funds. Nothing to compare with this appears in the Federal Reserve Act. The state requirement of trust companies further pro-

vides that money so deposited shall be a special deposit. It shall not be mingled with the investments of the capital stock nor with other money belonging to the trust company or liable for its debts, and 2 per cent interest shall be allowed on it. Not only must the money be kept separate and accounted for separately; it is a separate department and completely independent in its management, as if it were indeed a separate and distinct organization. When a trust company takes on the discharge of duties as executor, etc., it elects to conduct new business distinct from its trust company business, and to become peculiarly responsible for funds which have nothing to do with and cannot add to the prosperity of its ordinary business, nor make the functional discharge of its regular business any easier or more effective. The trust company might fail with complete loss to all stockholders and depositors, and yet that would not affect in the least the security of the trust funds if the statute is complied with. A trust company, by reason of taking on this additional duty, and engaging in this outside business, is not competing with national banks as a trust company. It would be exactly the same as if the legislature should attach such a function to Probate Courts. Considering then that the legislative department of the state has not seen fit to give such authority to state banks, and has not given such authority to trust companies as an aid to the conduct of their ordinary business, but has

selected trust companies to discharge such duties only on condition that they create a separate and distinct operative agency, there is no such competition with national banks, as is contemplated in the Federal Reserve Act. The exercise of such functions by national banks is not necessary in the performance of the service for which they were created. We cannot admit that Congress intended to give national banks an advantage in competition with state banks.

The relator hastens to assure us that state authorities have no control whatever over national banks, except as permitted by the Congressional Act. This court has recognized that in the recent case of *State v. National Bank*, 249 S. W. 619. The legislature of this state cannot by any means, require on the part of national banks a compliance with the conditions mentioned which reflect the legislative policy of the state and national banks, restrained by the law of their organization cannot comply with them. Thus it plainly appears that the relator cannot act as executor in this case because the exercise of such function would be in contravention of the state law.

VI.

The authorities support the conclusion we have reached. The most important case, of course, is the *First National Bank v. Fellows* (244 U. S. 416) referred to above. That case arose in Michigan where the attorney general brought a *quo*

warranto proceeding against a national bank (92 Mich. 640), questioning its right to act as trustee, executor, etc. The Supreme Court of Michigan held by a majority ruling, (a) that the provision in the Federal Reserve Act 11 (k) was not in contravention of the state law, neither of any express provision of the statute, nor of the legislative policy of the state, (b) but that the exercise of such function by a national bank was unconstitutional. The United States Supreme Court, where the case went on writ of error, gave special emphasis as quoted above, to the right of the state to determine the question of contravention. The court said, (244 U. S., l. c. 425), referring to the Michigan decision: "In view of the express ruling that the enjoyment of the powers in question by the national bank cannot be in contravention of the state law," the state court proceeded upon the erroneous assumption that because a particular function was subject to be regulated by state law, "Congress was without power to give a national bank the right to carry on such functions." The United States Court then reversed the ruling, not because the Michigan Supreme Court erred in determining the question of contravention, but erred in holding that Congress had no constitutional right to invest national banks with such functions. The court then further indicated a deference to the power of the state to control its own affairs, as follows (l. c. 426-427)

"That the statute subjects the right to exert the particular functions which it confers on national banks to the administrative authority of the Reserve Board, giving besides to that board power to adopt rules regulating the exercise of the functions conferred, thus affording the means of co-ordinating the functions when permitted to be exercised. It charged all national banks with reasonable and non-discriminating provisions regulating their exercise as to said corporations, the whole to the end that harmony and the concordant exercise of national and state power might result."

This is a definite statement of the United States Supreme Court that the rules regulating the exercise of the functions under consideration provided by the Reserve Board must co-ordinate with the state regulations. No doubt the conditions in Section 11 (k), were framed to meet the usual requirements and regulations to be expected in state statutes "to the end that harmony and the concordant exercise of national and state power might result." This seems to be a plain indication that if the state has regulations and exacts conditions for the exercise of these fiduciary powers, with which a national bank cannot comply and with which the state legislature is powerless to compel compliance, then the exercise of such functions by a national bank is in contravention of the state law.

The case of *People v. Brady*, 271 Ill. 100, is referred to in the cited cases and furnishes an important illustration of the subject. That was

a mandamus proceeding at the relation of a national bank, asking a peremptory writ requiring the issuance to relators of a certificate of qualification to act as trustee, executor, etc. The Supreme Court of Illinois, in a very able and lucid opinion, held that the exercise of functions prescribed in Section 11 (k) were in contravention of the state law, pointing out as regulating the exercise of such functions the Illinois Statutes which could not be applied to national banks. The opinion also denies the constitutional authority of Congress to regulate and provide for the exercise of fiduciary functions because they come strictly within the state control.

That decision was rendered before the Fellows case got to the Supreme Court. After that ruling the same national bank brought another mandamus proceeding in the Illinois State Court on the theory that in the Fellows case the United States Supreme Court overruled the conclusion reached by the Illinois court in the Brady case. That case came before the Supreme Court of Illinois. (*State ex rel. v. Russell*, 283 Ill. 520). The court then refused to grant the relief prayed on the ground that the former ruling was *res adjudicata* and indicated (l. c. 524), that if it were not for the conclusiveness of the former judgment the court would be obliged to rule differently, conceding that the former judgment was erroneous. In that obiter statement the Illinois court shows a misunderstanding of the point decided in the

Fellows case. The only question considered in the Fellows case and the only point upon which the Michigan Supreme Court was overruled was as to the constitutionality of the provision in the Federal Act. The Illinois court evidently failed to notice that the Federal Supreme Court did not pass upon the question of whether the Federal Act was in contravention of the law of Michigan so as to affect that question when applied to the Illinois law. As a matter of fact, under the ruling in the Fellows case, the judgment in the Brady case was not erroneous and would have been sustained by the Federal Supreme Court if the question had not got before it on the sole ground that the exercise of such powers by national banks in Illinois was in contravention of the state law. So that the ruling in the Brady case is still the law of Illinois on that question.

In case of *Aquidneck National Bank of Newport v. Jennings*, 117 Atl. 743, is where the Supreme Court of Rhode Island held that the provisions of Section 11 (k) were in contravention of the state law of Rhode Island. The court points out the statutes regulating the exercise of fiduciary relations such as are mentioned in Section 11 (k) and holds that the state cannot impose such regulations upon national banks and therefore the exercise of such functions by a national bank is in contravention of the state law. Rhode Island, like the State of Missouri, did not grant such powers to the state banks. The opinion says (l. c. 746):

"The extension by the General Assembly of this power of trust companies alone, of all corporations, is plainly because the provisions governing their creation and their regulation safeguard in a peculiar manner the rights of those beneficially interested in such trusts."

The same may be said of the Missouri Statutes in relation to that matter; the selection of trust companies alone and the peculiar manner of managing trust funds required, show that it is the legislative policy of the state that general banking institutions shall not be endowed with such functions. The brief of *amici curiae*, calls attention to recent statutes of this state giving trust companies certain additional powers which make them competitors of banks in respects where they were not such competitors before. This does not alter the attitude of the state towards such institutions. Trust companies are selected as fiduciary agents doubtless because the Legislature deemed them best fitted to meet the rigid exactions which the statute imposes upon the exercise of such trusts.

In the Appeal of Henry W. Woodbury, 78 N. H. p. 50, the question came before the Supreme Court of New Hampshire. In that case there was an express statute forbidding the appointment of banking companies and trust companies as administrators and executors. The court held that the exercise of the fiduciary functions mentioned in 11(k) of the Federal Reserve Act were in contravention of the state law. Of course, there is no express denial in the Missouri statute, but the

denial to banks of such functions is clearly implied and as emphatic as if there had been express denial.

No cases have been cited by petitioner in support of their position, when regulations and restrictions such as are imposed by the Missouri Legislature are present, where it has been held that the provisions of the Federal Reserve Act are not in contravention of the state law.

The Supreme Court of Pennsylvania, in case of *In re Turner Estate*, 120 Atl. 701, held that the provisions of the Federal Act were not in contravention of the law of Pennsylvania, on the ground that the regulation of such fiduciary functions was in harmony with the state regulations. There were no such stringent regulations as are provided in our statute. (*Hamilton v. State*, 94 Conn. 648. *In re Estate of Stanchfield*. 171 Wis. 553; *In re Mullinax*, 179 N. Y. Supp. 90; are cited.) In each case the exercise of such powers was expressly granted to state institutions which act is direct and general competition with national banks in the exercise of their ordinary functions.

In the regulation of trust funds the Federal Act is in direct conflict with the Missouri statute, above pointed out. Necessarily there would be a want of that "harmony and concordant exercise of national and state powers" which Chief Justice White, in the Fellows case held was necessary in such cases.

We think that both reason and authority support the view that the exercise of fiduciary functions mentioned in Federal Reserve Act, 11 (k), are in contravention of the law of Missouri, the legislative policy, and the express statutes.

The peremptory writ is therefore denied. All concur.

J. T. WHITE, *Judge*.